SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 394

JOHN S. FUNK, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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1 [Caption omitted.]

In United States District Court, Middle District of North Carolina

UNITED STATES
vs.
JOHN S. FUNK

Bill of exceptions

Filed April 12, 1933

Be it remembered that on the 15th day of December 1932 being one of the days of the regular term of said court, which began on the 5th day of December 1932, this cause came on to be heard before His Honor I. M. Meekins, U.S. District Judge, holding said court by assignment.

When and where the defendant was arraigned and pleaded not guilty, and a jury was duly sworn to try said cause, and the United States to maintain the issues on its part read the bill of indictment in open court, which is in words and figures as follows:

Bill of indictment

In the District Court of the United States for the Middle District of North Carolina. At Rockingham, September term, 1929

The grand jurors of the United States of America, within and for the Middle District of North Carolina, being duly empaneled, sworn, and charged at the term and in the district and division aforesaid, and *and* inquiring for that district, upon their
1(a) oaths do present: That at and during the times hereinafter set out, John S. Funk was a duly appointed, qualified, and acting prohibition agent for and on behalf of the United States of America in an official function under and by authority of the Bureau of Internal Revenue of the Treasury Department of the United States, attached to the office of the Federal Prohibition Administrator, for the eighth prohibition district, which includes the States of North Carolina, South Carolina, and Virginia, theretofore duly appointed as such by the Commissioner of Internal Revenue of the United States with the approval of the Secretary of the Treasury, pursuant to the provisions of the acts of Congress; that as such Federal prohibition agent the said John S. Funk was charged with the duty of enforcing the National Prohibition Act, commonly known as the "Volstead Act", and the acts amendatory thereof and supplemental thereto, and inquire into and investigate any and all violations of the said National Prohibition Act, and to apprehend any and all persons found in the act of violating the said National Prohibition Act, and to seize any and all vehicles and other properties used in

connection with the transportation of intoxicating liquors and violations of the National Prohibition Act, and to make a true and accurate report of his inquisition and investigation, and of all violations of said National Prohibition Act, and of his activities in connection therewith, to his superior officer, in the district where he was assigned to duty, and at the times hereinafter set out the said John S. Funk was duly assigned to work as prohibition agent in the States of North Carolina, South Carolina, and Virginia, and particularly in the Middle District of North Carolina and the Western District of Virginia.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: that on the 1st day of September 1928, and on divers other days both prior and subsequent to said date, Guss Dowdy and Charlie Martin (said Charlie Martin is not indicted herein for the reason he is used as a witness) and other persons whose names are to the grand jurors unknown, were engaged in the business of manufacturing, transporting, selling, and possessing intoxicating liquors, in violation of the National Prohibition Act in the State of North Carolina, and in the Middle District of North Carolina, and in the State of Virginia, in the western district thereof, as well as various other places in and out of the said States of North Carolina and Virginia.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: that the said John S. Funk, Guss Dowdy, and Charlie Martin (said Charlie Martin is not indicted herein for the reason he is used as a witness) on or about the 5th day of July, A.D. 1928, and on divers days prior *prior* and subsequent thereto up to the filing of this indictment, at and in the middle district of North Carolina and within the jurisdiction of this court, unlawfully, wilfully, knowingly, corruptly, and feloniously did combine, conspire, confederate, and agree together and among themselves and with each other and with divers other persons to the grand jurors unknown, to commit an offense against the United States, that is to say, to unlawfully manufacture, possess, transport,
1(b) barter, sell, furnish, and deliver intoxicating liquor, containing more than one half of one percent of alcohol by volume and fit for beverage purposes, to wit, whisky, brandy, home brew, and other intoxicating liquors, in the Middle District of North Carolina and within the jurisdiction of this court, and in other States and places to the grand jurors unknown, in a manner contrary to the requirements of and without complying with the provisions of the National Prohibition Act of October 28, 1919 ,and the acts amendatory thereof and supplemental thereto, and the rules made pursuant thereto.

It was a part of said conspiracy that the defendants Guss Dowdy and Charlie Martin should manufacture, possess, transport, barter, sell, furnish, and deliver intoxicating liquor both at wholesale and retail and that the said John S. Funk would aid, abet, assist them

in carrying on and conducting said business of handling said illegal liquor traffic as aforesaid, and otherwise dealing in intoxicating liquor.

It was further a part of said conspiracy that the said John S. Funk himself and through other parties working under his direction, should keep them, the said Guss Dowdy and Charlie Martin, and other persons to the grand jurors unknown, informed as to the movements of the other Federal prohibition agents and officers of the law charged with the enforcement of the National Prohibition Act, as aforesaid, and to notify, advise, and warn them of the easiest and 'afest ways of transporting and places of delivery, and of the presence or approach of officers of the law, and of the hazards of the roads, highways, and places, and otherwise aid, abet, assist, and protect said Guss Dowdy and Charlie Martin and other persons to the grand jurors unknown, in the illegal handling of said intoxicating liquor.

It was further a part of said conspiracy that the said John S. Funk should act as general advisor of said Guss Dowdy, Charlie Martin, and other persons to the grand jurors unknown, and that he, the said John S. Funk, in hazardous times and places, should go along with said defendants, their agents or servants, or in an automobile used as a pilot for said vehicles used in the unlawful transportation of said intoxicating liquors, and use his official position and office to insure protection of the delivery of said intoxicating liquors and the handling and conducting of said business as hereinbefore set out, and the immunity of said defendants, their agents, servants, and employees from molestation or interference of other officers.

It was further a part of said conspiracy that the said John S. Funk would not arrest any of the defendants or their agents, servants, or employees while engaged in the unlawful conduct of their business as hereinbefore set out, and would not seize their automobiles or other property, or intoxicating liquors belonging to them, and would not make a report of their unlawful dealings and transactions in connection with the same, and that he, the said John S. Funk, would use his official position and influence to protect the said defendants, their agents, servants, and employees in the event they otherwise became involved in the law by the efforts of other officers of the law.

1(c) It was further a part of said conspiracy that the said Guss Dowdy and Charlie Martin and other persons to the grand jurors unknown, should pay, and did pay, the said John S. Funk for the services rendered by him in assisting them in their unlawful acts and conduct as herein set out.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: that in pursuance of said conspiracy and to effect the object thereof the said John S. Funk, Guss Dowdy, and Charlie Martin, in the Middle District of North Carolina, and in other places in and out of the State of North Carolina, and within the jurisdic-

tion of this court, on or about the 5th day of July 1928 and on divers other days prior and subsequent thereto and up to the filing of this indictment, wilfully, knowingly, and unlawfully, did and caused to be done the following overt acts, to wit:

1. That on or about the 5th day of July 1928 the said John S. Funk, Guss Dowdy, and Charlie Martin had a conference in the city of Greensboro, State of North Carolina.

2. Further, in pursuance of said conspiracy and to effect the object thereof, on or about the 5th day of July 1928 and other days prior and subsequent thereto the said John S. Funk, Guss Dowdy, and Charlie Martin left the city of Greensboro, pursuant to the agreement they then entered into at the conference set out in the next preceding overt act, and went to the State of Virginia, where the said Charlie Martin and Guss Dowdy were then engaged in unlawfully handling intoxicating liquors.

3. Further, in pursuance of said conspiracy and to effect the object thereof, and immediately following the conference in Greensboro, as set out in overt act number "1" and the trip to Virginia, as set out in overt act number "2", the said John S. Funk did aid, assist, abet, and use his official office and position in protecting the said Guss Dowdy and Charlie Martin in transporting intoxicating liquors in violation of the law.

4. Further, in pursuance of said conspiracy and to effect the object thereof, during the month of September 1928, and prior and subsequent thereto, at Dowdytown, in the State of Virginia, and other places, the defendants entered into an agreement by the terms of which the said John S. Funk agreed to give the said defendants, their agents, servants, and employees protection in unlawfully handling and transporting intoxicating liquors, and in the conduct and operation of their illegal liquor traffic and to withhold and conceal their dealings and transactions in connection with the same, and to use his influence and official position to keep such violations and the violators out of court and from prosecution, and to otherwise obstruct, impede, and suppress evidence, to quash, and otherwise prevent prosecution of such violations and the violators.

5. Further, in pursuance of said conspiracy and to effect the object thereof, on the said 5th day of July 1928 and prior
1(d) and subsequent to said date, the said John S. Funk, Guss Dowdy, and Charlie Martin did enter into an agreement by the terms of which the said John S. Funk should be paid for his services and the use of his official influence in assisting the said defendant, their agents, servants, and employees in conducting and carrying on said unlawful liquor traffic.

6. Further, in pursuance of said conspiracy and to effect the object thereof, during the months of September, October, November, and December 1928, the said Charlie Martin did pay to the said John S. Funk a total sums of approximately $800.00.

7. Further in pursuance of said conspiracy and to effect the objects thereof, during the months of September, October, November, and

December 1928, the defendant John S. Funk, and others acting for him, frequently used his official position and knowledge of the movements of the Federal officers and communicated with the said Charlie Martin and defendants and persons to the grand jurors unknown, in making reports and advising them as to the whereabouts of Federal officers and when and where, the time and places, that it would be safe to move and unlawfully transport said intoxicating liquors, and warning them when it would not be safe for them to do so.

8. Further, in pursuance of said conspiracy and to effect the object thereof, on the 27th day of September 1928 the said John S. Funk at Greensboro, North Carolina, in the middle district, conferred with said Charles Martin about suppressing an alleged violation of the National Prohibition Act.

9. Further, in pursuance of said conspiracy and to effect the object thereof, on the 28th day of September 1928, in consequence of a conference at Greensboro, North Carolina, as set out in the next preceding overt act, the said John S. Funk went to the city of Roanoke, in the State of Virginia, where said Charlie Martin did pay to the said John S. Funk the sum of $200.00 for the suppression of an alleged violation of the National Prohibition Act.

10. Further, in pursuance of said conspiracy and to effect the object thereof, during the time of the dealings and transactions by the said John S. Funk and the said Charlie Martin, the said John S. Funk obtained from the said Charlie Martin one thirty-two Smith and Wesson pistol.

11. Further, in pursuance of said conspiracy and to effect the object thereof, during the time of the dealings and transactions between the said John S. Funk and the said Charlie Martin, as herein set out, in the city of Greensboro, middle district of North Carolina, the said John S. Funk let the said Charlie Martin have one thirty-eight Smith and Wesson pistol.

1(e) 12. Further, in pursuance of said conspiracy and to effect the object thereof, at various and sundry times, the said John S. Funk visited and communicated with the said Charlie Martin and Guss Dowdy and other persons in North Carolina and Virginia, and said defendants likewise visited the said John S. Funk in the city of Greensboro, North Carolina.

13. Further, in pursuance of said conspiracy and to effect the object thereof, the said Charlie Martin and other defendants delivered to the said John S. Funk large quantities of intoxicating liquors at his home in the city of Greensboro, middle district of North Carolina, and various other places.

14. Further, in pursuance of said conspiracy and to effect the object thereof, on or about the 20th day of December 1928, in the State of North Carolina, and the middle district of North Carolina, and within the jurisdiction of this court, the said John S. Funk did substitute for the purpose of analysis certain beer in the place of home

brew previously seized under a search warrant executed on the premises of W. H. Langley and wife under date of October 20, 1928.

15. Further, in pursuance of said conspiracy and to effect the object thereof, on or about the 20th day of December 1928, the said John S. Funk, at and in the city of Greensboro, North Carolina, sent the beer substituted for the home brew seized as set out in the next prece'ing overt act, to the Government chemist at Charlotte, North Carolina, for analysis, in an effort to suppress the evidence of the home brew seized under said search warrant, and prevent a prosecution against the said W. H. Langley and wife for the unlawful possession and sale of said home brew.

16. Further, in pursuance of said conspiracy and to effect the object thereof, the said John S. Funk failed and neglected to make a report of said seizure of said home brew under said search warrant from said W. H. Langley.

17. Further, in pursuance of said conspiracy and to effect the object thereof, on or the 11th day of January 1929, at Liberty, in the State and middle district of North Carolina, and within the jurisdiction of this court, W. H. Langley and wife did pay to Charlie Martin the sum of $150.00, who in turn paid said sum to John S. Funk for his services in substituting said beer of a low alcoholic contents in lieu of the home brew seized by the said John S. Funk under the search warrant herein set out, to prevent a prosecution of the said W. H. Langley and wife for violation of the National Prohibition Act.

18. Further, in pursuance of said conspiracy and to effect the object thereof, on the —— day of September 1928 the said John S. Funk had a conference with Charlie Martin, W. H. Langley, and others in which it was agreed that the said John S. Funk would guarantee said W. H. Langley protection, as far as the Federal law was concerned, in handling intoxicating liquors in violation of the National Prohibition Act.

1, (f) 19. Further, in pursuance of said conspiracy and to effect the object thereon, on the 23rd day of January 1929, the said John S. Funk did communicate with, and protect, the said Charlie Martin and others in violating the National Prohibition Act in the transportation of eighty gallons of intoxicating liquors.

20. Further, in pursuance of said conspiracy and to effect the object thereof, on or about the 28th day of January 1929, in the State of Virginia, said Charlie Martin did procure and cause the title to be transferred for a Ford roadster automobile, and the said automobile to be delivered to the said John S. Funk without any consideration whatsoever except the protection theretofore given.

21. Further, in pursuance of said conspiracy and to effect the object thereof, during the months of September, October, and November 1928, and for a long time prior thereto and subsequent to said months and up to the April term of Federal court of the middle district of North Carolina, in Greensboro, the said John S. Funk did associate with and assist Clay Fogleman in the liquor traffic in

violation of the National Prohibition Act, to wit: manufacturing, transporting, and selling intoxicating liquors.

22. Further, in pursuance of said conspiracy and to effect the object thereof, during the time of the association and assistance given the said Clay Fogleman by the said John S. Funk, the said Clay Fogleman paid the said John S. Funk large sums of money for protection and particularly the sum of $500.00.

23. Further, in pursuance of said conspiracy and to effect the object thereof, at the April term of the Federal court for the middle district of North Carolina, in the city of Greensboro, after the said Clay Fogleman had been convicted and sentenced to the Atlanta Penetentiary, the said John S. Funk executed and delivered to the said Clay Fogleman a note in the sum of $500.00 for him, the said Clay Fogleman, to keep quiet and not make any disclosure of their unlawful transactions.

24. Further, in pursuance of said conspiracy and to effect the object thereof, on or about the 10th day of December 1927, in Guilford County, State and middle district of North Carolina, Clay Fogleman and John S. Funk did unlawfully transport forty gallons of intoxicating liquors.

25. Further, in pursuance of said conspiracy and to effect the object thereof, during the month of October, 1928, and at other times prior and subsequent thereto, the said John S. Funk in the city of Greensboro, State and middle district of North Carolina, and within the jurisdiction of this court, did make and keep false records and reports and accounts of his official actions, and failed to make reports of violations of the prohibition law.

1 (g) 26. Further, in pursuance of said conspiracy and to effect the object thereof, during the times herein set out and for the purpose of corruptly prostituting and debauching his office and position, the said John S. Funk did issue false warrants and effect settlements and accept bribes therefor.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

E. L. GAVIN,
United States Attorney.

And the United States to further maintain the issues on its part called as witnesses the following persons, who testified as follows, to wit:

2 CHARLIE C. MARTIN, witness for the Government, being duly sworn and examined, testified as follows:

From June 1928 until sometime in the early part of 1929 I had two filling stations out near the North Carolina line. One was in North Carolina, and one was in Virginia. I had two in Virginia and one in North Carolina. I was also engaged in selling whiskey, wholesaling and retailing it, both. I covered the territory, from Danville to Richmond, to Raleigh, Sanford, Liberty, and as far as here, in this

State. I hauled it in automobiles, and kept most of it, over where I lived. Some I kept at the filling station. I had five or six pits, one in the house, one under the driveway, one in a barn, two or three down in the woods, just in front of the house. I had customers at those different places, handling my liquor, and had prior arrangements with my customers in respect to selling liquor.

I know John S. Funk. The first time I met him to talk to him was along in July. I don't recall the date. It was in the year 1928. Gus Dowdy and I were at the front of the filling station, and a boy that worked for me drove up and said he wanted to go over to Greensboro and get his brother's wife. I said, "All right, Gus, lets ride over there." We came on over here, and as we started back we picked Mr. Funk up under this underpass, I don't know what street it is now, going from here to Danville, and we taken him to Danville and went over to Gus's farm. He had cattle and mules. We went in the barnyard and talked. We went to Martinsville. Mr. Funk and Dowdy said they were going up there. From that time I saw Mr. Funk possibly once a week, or I will say, once every two weeks anyway. It was a good many times. I don't know just how long after that, Mr. Funk called me up and told me to come over to Greensboro right away, that he would meet me at the U-Drive-It, so I got in the car and came over here. I parked the car around the corner, and he was standing in front of the U-Drive-It, and he came over where I was. He said, "I got something I want to tell you. I have been told you are a good fellow." He said, "Undercover agents have bought a couple of pints of whiskey from your wife and Mrs. Craig. Now I am willing to do anying for you boys over there I can. I think if I can catch Dofflemeyer I can stop it." I told him, all right, I would appreciate it. Dofflemeyer was the undercover agent, was supposed to have bought the whiskey. Funk said he was going to court and would indict them at Big Stone Gap, and if he could get Dofflemeyer before he got there he might stop it. I asked him how much it will take. He said, "I don't know." I says, "Will $200.00 be enough?" and he said, "Sure." He also said he wouldn't charge anything for what he did. I said, "All right." The agreement was, when I left him, that if he could catch Dofflemeyer, he would call me next evening around three o'clock. I was at the filling station and heard the telephone ring. I knew it was long distance, and was expecting the call. I went to the telephone Funk told me to meet him in Roanoke at Patrick Henry that night, as quick as I could. So I gets the automobile, $200.00, goes to Roanoke, and meets him at the Patrick Henry Hotel. He told me
3 we would have to go up to the Roanoke Hotel, that Dofflemeyer was there. So we went, and he goes up on the elevator. When he got back he said some other officer was up there with Dofflemeyer, that I could not go up there then. But he says he got it all fixed. So we go in the toilet of the Roanoke, and I gave him $200.00. I left and goes back on back to town. He told me that he was going to

get the whiskey so I could convince my wife and Mrs. Craig that the man had bought the liquor there. I asked him how he was going to fix it, and he said he was going to get whatever he had to get. After I paid him the $200.00 I went back home. I can't recall whether we had supper that night or whether it was the time before. I was in Roanoke with him after that. As to the connection I had with him in conducting the liquor business, he came to my filling station and wanted to borrow $50.00, and I told him, all right. He brought up the subject of these two other favors he had done me. He said again that he didn't mind favoring us, and I just can't recall the whole conversation, but anyway I told him, and he told me that it was some undercover men working in Burlington, and he said if I would give him a list of the names of my customers, he would let me know if they arrested any of them. So I did, and he called me up and I go over to his house, and he showed me a list of names of people supposed to have been caught by these undercover men working in Burlington. Some were customers of mine and some were not, and I said "Do all you can to have them turned loose" and he said he would.

He called me and told me about old man Langley, I think it was. He lived four miles out of Liberty and was a customer of mine. Funk said that they had gone down and searched and found some home brew around the place there and some whiskey in some old sacks. So he told me he might get it fixed up, and I said all right. I think I was down at Langley's and told him that he had been caught. He said he knew it, that he ought to know it. He said, "What can you do about it?" I told him I could get it fixed, I thought. I later saw Mr. Funk concerning the Langley transaction. Mr. Funk told me he could get the Langley case straightened up for $150.00. I gave him the money. The case came back less than ½ of 1%, and I think was dismissed. Funk said he would settle and stop the Langley transactions by substituting some meal and water in same size bottles—just like that it was caught in—and send it off, malt, meal, and water. Arrangement for that was made. I fixed up some near-beer bottles and put it in the near-beer bottles and sent over to this house, and I saw him that day. I think court was going on. He said that wouldn't do; it was not the same kind of bottles. He said he would get the bottles. He took it there at his house, and came back and told me it was all fixed. I went to old man Langley and he gave me a $150.00 check. I gave the $150.00 to Funk and took the check; he didn't want the check, and I took it. I would recognize those bottles—the first two on this side [indicating] was the bottles that we fixed and he said wouldn't do. Those other bottles are the bottles that he fixed [indicating]. Those are the two that wouldn't do. The balance are the ones he fixed. That is the check Langley gave me [indicating]; it is the one I endorsed, as did also Hugh Williams, who lives in Danville.

(We offer check of W. H. Langley for $150.00 payable to Charlie Martin, dated Jan. 11, 1927, drawn on the Bank of Liberty, as Government's exhibit no. 1.)

4 (We offer these bottles here, Your Honor, as Government's exhibits 2, 3, 4, & 5.)

(Government's exhibits 1, 2, 3, 4, & 5.)

I took the check to Mr. Funk, but he didn't want it, so I gave him the money out of my pocket, and took the check myself, it is payable to me. We had an understanding or arrangement that he was to protect me and my customers, by looking out for me and letting me know.

(Defendant objects. Objection sustained.)

He told me that, any time, he would let me know, notify me that the law was up on that Martinsville Road, or in that section where I was selling whiskey, and he did, by telephoning. I had a telephone, there were five telephones in reach of me, and I received messages from him, over all of them. I know Nick Vaughn, he lives at Burlington, and is engaged in selling whiskey. He was one of my customers. Mr. Funk came to me and said Vaughn had been caught, and told me to go see Mr. Vaughn, and see what he could do, and I went to see him and he agreed to pay him, and Funk called me and said he had it fixed. I sent to Burlington and got Nick and brought him to my filling station. Funk came on the train and I sent to the depot and met Funk and his wife, and I sent Mr. Funk's wife over at my house, and he and I stayed at the filling station with Mr. Vaughn. Funk said he was afraid of Vaughn. I come to Greensboro that night with Mr. Vaughn, Mr. Funk, and his wife and a boy that worked for me, John Goodson. We drove by Mr. Funk's house. John Goodson drove. Me and Mr. Funk and his wife I think were in the back seat, and Vaughn and John were in the front. Mr. Vaughn gave me, I don't remember whether it was $150.00 or $120.00, in the presence of Mr. Funk. He was looking, I guess, right at it. I gave it to Funk, because he got his case settled, the same as Mr. Langley's case. He had a paper. He tore the seal out. There was a seal on this paper. He put the seal in his pocket and he gave me the paper and I gave it to Vaughn. Vaughn was never prosecuted on that transaction.

I know Ernie Andrews in Burlington, he was one of my customers, he was engaged there in the whiskey business. There was a transaction between Mr. Funk and me in respect to a prosecution against Andrews. Funk told me that Andrews had been caught, but Andrews said he didn't believe it. I told him I didn't know whether he was or not.

(Defendant objects to conversation with Andrews. Objection sustained.)

I took Andrews over to Funk's house. I introduced him as my brother-in-law, though he was not. Mr. Funk told me in the presence of Andrews that Andrews had been caught, and Mr. Andrews said he didn't have any money. Me and Funk went down to see him.

He said he would have some the next day or next night. Mr. Funk said he was bound to have some money to do it. We drove down to Andrews and he still said he didn't have any money. I can't remember the conversation between Mr. Funk and Andrews. Mr. Funk was present when I talked with Andrews in Burlington, he was standing as close to me as from here to the man at the door. Andrews never paid me any money. Coming back from Burlington Mr. Funk said he was bound to have some money. I let him have some. He said he would give it back when Ernie paid him. Certain officers stopped me on the highway near Burlington. Mr. Funk was present on that occasion, he wasn't with me, he was with the officers. I had some liquor going to Graham, some going to Burlington. I was to carry Mr. Andrews, I don't know how much, maybe 50 gallons. It was about six o'clock and getting dark. The telephone rang, and I went to the telephone. Mr. Funk said don't go on to Burlington, said they are going to catch you. I says all right, I know it. I said, who was going to be along?

I took the liquor I was going to carry to Graham, and unloaded it, and I drove on down there. After I got where I was supposed to meet Andrews car—the car was setting there. When I cut my lights off there were six or eight or ten come out and surrounded the car. Mr. Funk stepped on the running board and took the keys out. I commenced laughing. He said to hush. We went down the road and stopped at a barn. Someone suggested that the liquor was put off at the barn. Mr. Funk said he couldn't go in the barn. He told the others the Government wouldn't allow him to search it. So we turned around. The county law went in the barn. They did not find any liquor. Funk rode on back up the road on the car with me. He came on home and I waited. I came on by his house. He told me he thought they were going to get me. I said, "Oh, no." That was about three or four o'clock in the morning. I went on home.

I saw Funk over at the filling station after that. Sometime thereafter I got a letter, a sealed letter addressed to Mr. John S. Funk, Greensboro, N.C. That is the letter [indicating], I got it at Mr. Funk's house. It wasn't so long after I had been stopped down there by officers, near Burlington. Mr. Funk gave it to me, and I told him I wanted it. He said, all right, to show it to Andrews. I showed the letter to Andrews. I don't know what he done with it. I gave it to Andrews. That is the letter [indicating]. I am not in the liquor business now. I got caught and put in jail.

This is a letter stamped at Graham, N.C.

January 29th, 11:00 a.m., to Mr. John S. Funk, 748 Chestnut St., Greensboro, N.C. On the back of it: "From W. H. Lashley, 302 Fisher St., Burlington, N.C." The letter is: "Burlington, N.C., January 28, 1929. Mr. J. S. Funk, Greesboro, N.C. Dear Sir: Just a line to let you know we caught the fellow with the Cadillac that laughed at us last Wed. night. Enclose you will find a clipping from the paper about it. We also got Tony Chandler, who you have a case against in your court that has not been tried yet. Wanted to

let you know he hadn't quit. Please tell Judge Hayes about this as Chandler will come up before him soon and the people of Burlington want Judge Hayes to give him what is coming to him. Come down as soon as you can.

Yours very truly,

W. H. LASHLEY,
302 Fisher St., Burlington, N.C.

Night phone, #727W. Day phone, 321.

6 I do not know if Lashkey was out on the road the night we were stopped, as I did not know him then. Funk told me to show the letter to Ernie Andrews. To my knowledge Andrews never paid any thing.

I know Larkin Kivett. He lived about three or four miles from Langley. I had a transaction with Mr. Funk with respect to a prosecution against Kivett. He was a customer of mine. Funk said he would fix Kivett up for $100.00. I took him down to Larkin Kivett's and he got out about 200 yards up the road. I went to the house, I told Larkin, and he said all right. Larkin gave me $100.00. Bill Kivett and I got in the car, or walked back to the car, I don't recall. I gave the $100.00 to Mr. Funk. Mr. Funk got in the car and we go back to Greensboro. I do not remember what Funk told me about the liquor violation. Mr. Funk told me that there were two deputy sheriffs down there wanted to turn the case over to the Federal authorities. I don't know whether it was this case. Mr. Kivett had two or three cases in court at this time. I went to Harrisonburg with Mr. Funk to his home there. Mr. Funk, myself, his wife, and I don't know whether it was one or two of his children, went down to his mother's, spent the night and came back next day. I was in the liquor business at that time. Mr. Funk knew I was engaged in the liquor business at that time. We talked all the way down there, in respect to my being caught by officers, and what he had done to protect me. He told me that somebody had offered him $200.00 to catch me and he said he intended to catch me, and he told me some reasons he didn't. That was before my relationship with him. I had two pints of liquor with me on that trip. I paid him money. I gave him money because he had called me and did call me, and promised to help me if he knew if any of the law was up there, that he might save me from getting caught. Naturally, when he asked for money I gave it to him. I gave him an automobile besides money. It was a Ford roadster, and two gallons of peach brandy. From the time I met Mr. Funk until February 1929, some weeks I would see him two or three times. Sometimes I wouldn't see him *him*. Maybe he would call me up. I don't know just how often it was. I had showed him the storage places of my liquor in and around Dowdtown. I had a trap in the house, had 155 gallons there, which I showed Funk. I was not prosecuted by Mr. Funk.

Cross-examination by Mr. HAMMER:

I don't recall the first time I saw Funk to know him. The first time I had conversation with him was the time when Gus Dowdy and some young fellow with his wife and I met him down here about this overhead bridge, I was introduced to him there.

(Objection on the part of the Government. To what Dowdy said. Objection sustained.)

7 I know what he told me, not to let him know I was in the liquor business. He told me in May or sometime before that, that he was supposed to have caught me, so I guess he must have known it. I came here today from jail, where I have been staying for the last month or two. I was in jail for whiskey. I have been convicted of larceny, and for stealing an automobile. I have never been convicted for running stills. I violate the laws, but would not consider myself a notorious violator of the law. I have been convicted for felony twice, once I think, for felonious assault, four times for the liquor business. I had just been caught by two revenue officers before I gave information in this case, but had not been arrested. I did not open up to the revenue officers, I first told about Mr. Funk's connection with it. I think, when I went to Mr. Merrick's in Richmond, or to the assistant in his office. I did not think Merrick was going to give me protection. I was then charged with violation of the liquor law in North Carolina in the State courts. The day that Dowdy and I met him over there, and we picked up Funk, we went back to Danville. From Danville we went to Martinsville. I don't recall how we came back. I didn't know at that time, that Funk was on official business. I know what he said.

(Objection on the part of the Government. Overruled.)

I did not know that Funk was assisting on that trip—instead of taking a social trip with me—in locating a man that had escaped, and doing his duties as an officer. I had heard the conversation between Price and Gus Dowdy. I don't know that Mr. Funk has been one of the most active revenue officers in this section. I never seen him over there making a raid in my life. I have seen him over there twenty-five times, but not raiding—not what I call raiding. I call officers hunting for whiskey and taking it when they find it. I spoke of going to Roanoke and making a settlement or paying money. I sold liquor for that money—that where I got it. Mrs. Craig helped me pay the $200.00, I got from Gus Dowdy. She gave me check for $100.00. I don't know what I paid with the check. Mrs. Craig gave it to me to reimburse me for the $100.00. I gave Funk in Roanoke Hotel. When I went to Roanoke I went first to the Patrick Henry Hotel, from there to the Roanoke Hotel. I stayed in the lobby while Funk went in. I left the car on the drive in front of the hotel. There were two fellows sitting in car. I do not recall if I testified before that they did. I did not come by Greensboro when I came back to Roanoke. I came back through Martinsville. I got lost over there. Before I went to Roanoke I had

seen Funk standing in front of the U-Drive-It. I don't think anyone heard the conversation between us. He was particular not to let anybody be around. I did not say anything to him about that trip, when I came over here to see him. It was understood that he was to call me. I don't recall whether that $100.00 check was endorsed by Prillman, a moonshiner.

I started to Roanoke in the middle of the evening, three or four o'clock, something like that. It was dark when I got to Roanoke. I didn't see anybody in particular that I knew. I didn't see Dewey Doffiemeyer. No one came in the public toilet while we were down there. There were no shoe shiners, no boot-blacks in there. I could not tell the date of the time I was around at Funk's house and got the letter from Lashley. I do not know who broke open Funk's bureau and secretaries in his house while he was in Virginia.

8 I do not know who went through this property over there.

I know that Mr. Langley knew Funk, because he had seen Funk at my filling station, but I don't know if Funk knew Langley. I considered Langley a good customer of mine. Larkin Kivett was at home the day he gave me the money for Funk. I do not know if Funk knew Kivett.

(Question at this point.)

Q. As a matter of fact, what you were doing—you were going to these customers of yours and you were telling them that they were all caught and you would tell them you could fix it with Funk, and you kept that money yourself and were blackmailing your own customers, weren't you?

A. No, sir—not for $150.00. They were worth more than that for 1 week. I know that Prillman has the reputation of being a liquor dealer. I don't remember how it happened that I took the check for $150.00 to Williams—a lawyer in Danville—I have owed Hugh Williams fees. Why I offered that check to Funk instead of giving him the money if I had the money in my pocket—I told him here it is—I said if you want it take it—you are right here at the bank. These people didn't know me. No, sir; the bankers didn't know me.

I think Funk was the first one who told me that Nick Vaughn had gotten caught. He also told me about Ernie Andrews. He called me up part of the time, part of the time he was at my house, part of the time at the filling station when he gave me the information. I do not recall the dates. He would tell me on the telephone where to meet him—to come to his house—to the filling station. I met him here at the post office, at the U-Drive-It place, on the streets going towards Danville, in Burlington. I did not keep my eyes on Funk because I knew was a dangerous man, nor did I keep a tab on his movements to protect my customers. I was not furnishing him information during this time. I did not report the Johnson filling station, didn't know there was one in that section. I did not report "Judge" Womack in Danville. I did not furnish in-

formation, nor try to make friends with the revenue officers to cover up my own operations.

Nick Vaughn was caught on the road from Ridgway into Burlington. There were two cars in the bunch with me that time, two and his Cadillac. I don't recall who was in this Cadillac. Ernie Andrews had four or five boys with him; I don't know who was in it. The cars were not decoys that night. When Mr. Funk came there, he came with Deputy Sheriff Lashley, who had called Funk down there. I had started some liquor out. I sent the Burlington back. When Funk called me I sent the Graham back. I came back after I stopped with Nick Vaughn that night. I got into his house, in the morning about three or four o'clock. When I got to Mr. Funk's house—Mr. Funk and his wife were there. I stated before that only Mr. and Mrs. Funk were there, but after they put Mr. Huffstickler on the stand I recalled that he was there also. Funk handed me some papers—I thought they were warrants. I don't know what became of that paper I gave Nick Vaughn. Nick Vaughn has it. I gave it to him. He said it was for protection, he was going to call me any time he knew the law was out and I was in danger. He told me that at all times he was glad to help me, and he would be willing to do it.

9 He told me that every time he wanted a few dollars. I do not know that Funk was at Mount Airy, N.C., registered at the hotel, the night I said I went to his house. He was at my filling station after that, I do not know the date. It was between the time I first met him, when Gus Dowdy and I met him, and February—that date somewhere. I might have remembered the date on the former occasion, when I said it was the 9th of January 1928. It was fresher in my mind. It was not but a year old—now it is four. I could not remember the date now at all. I saw Funk in June or July 1928. I wouldn't be positive which. I say in June or July and from then on. I don't think I missed seeing him or calling him up, or his wife calling. She would put in the call for Mr. Funk, and he and I would talk. I think I called her on one or two occasions. I think that I called over there and Mr. Funk was out of town, and she told me he was out of town. I left word for him to call as soon as he got back. I would not say that I knew that John S. Funk was in South Carolina working then, instead of North Carolina, and in Virginia part of June. When I got back to the car, I handed him the money in the Kivett case. Me and him were all that was there. I believe Will Kivett walked up to the car. I didn't say before that Funk didn't go up to Kivett's and that Funk hid down in the woods while I went for the money. I did not go up and bleed Kivett for the money, and Kivett didn't think anything else but that it was for Funk.

9

Redirect examination by Mr. CARTER:

At this point witness produced a paper, and was asked, "What is this?" and answered, "That is the check for $100.00 Mrs. Craig

gave me to put with the $100.00 I paid Funk in Roanoke. She reimbursed me. It is dated September 29th. I could not say whether she gave it to me before or after I came back from Roanoke. It was the day or next day. I have seen that check there [indicating]. The signature is Mr. Funk's. It says September. It is for $15.00 payable to cash. I got it from him. I think it was paid, his wife mailed my wife the money for that check: I don't remember now."

(Check dated September 10, 1928, payable to cash, for $15.00, signed by John S. Funk, is marked "Government's Exhibit No. 10", and offered in evidence.)

(Government's exhibit no. 10.)

Recross examination by Mr. HAMMER:

I gave the car to him, he didn't buy it of me. The check came back, I don't remember that Mrs. Funk, herself, wrote me a letter sending the cash. It was paid sometime later. It was some transaction between my wife and Mrs. Funk about the check. I could not say now whether it was paid or not. I can't remember.

Mr. CARTER. (Pistol shown.)

Yes, sir, I have seen that pistol. Mr. Funk had it. He said he had a large pistol, he said he had a 32: I let him have it.

(Pistol mentioned above is marked "Government's Exhibit No. 9", and offered in evidence.)

(Government's exhibit no. 9.)

(Telephone calls pinned together and marked "Government's Exhibit No. 13.").

(Government's exhibit no. 13.)

Mrs. MAY CRAIG, a witness for the Government, being first duly sworn, testified as follows:

Direct examination by Mr. CARTER:

My name is May Craig; lived in Pittsylvania County in the year 1928. I was engaged in running a lunch room. I know John S. Funk when I see him, that is all. I was informed by Charlie Martin that there was a prosecution against me and my sister in respect to the violation of the liquor law. Charlie Martin said, "I told you not to put your hands on liquor and handle liquor around here." He said evidently we had done it—the officers bought a pint of us. We said, "They did not." He said, "John S. Funk tells me they did." We went to crying, and he was mad. He said, "There is no use to bawl and cry, and I believe what he says: he says that he can get it fixed for you."

(Defendant objects to fixing—overruled for the present.)

Defendant's exception no. 3

He said, "He is going to let me know tomorrow afternoon: he is going to call me, try to see the man in Roanoke and call me tomorrow around three o'clock." Funk called, I called Charlie, and he said he would be there. Charlie said I would have to give him $100.00. I

didn't have it then. I had it in the bank, I gave it to him the next afternoon. It was Charlie's place of business, I worked there, sold lunches and drinks. I didn't sell liquor. I gave him the $100.00 because he said, "You evidently did", and I felt if an officer swore it I would have to go to jail. It hurt me to think they would take people up who had committed no crime, and send them to jail. That is the check I gave Charlie Martin, that is my signature. Later I came to Greensboro and had the man Dofflemeyer pointed out to me. Charlie brought sister and I to Greensboro one afternoon, and he drove us in front of the U-Drive-It Co, and we sat in the car. Charlie drove in front of the U-Drive-It filling station on a street that runs this way [pointing] and stopped there. Mr. Funk drove up. I had never seen him before. He was in a T model Ford. Charlie and him went in the U-Drive-It, and we sat in the car. Charlie came and told us Mr. Dofflmeyer is going to pass here in a few minutes, and you will see him. I recall other telephone messages or conversations between Charlie and Mr. Funk. Mr. Funk never came to that filling station where we stayed. 34F05 was one of the numbers of the phone. Mr. Funk didn't call over that phone. 34F25 was the telephone number in the place we stayed. Some one called who said it was Mr. Funk. I could not swear to his voice

11 Judge MEECHINS:

The witness testified that it was the day after Martin charged her with having sold some liquor, a telephone call received at her place of business, and an inquiry was made for Mr. Martin, and Mr. Martin took the phone and had a conversation. Mr. Martin got in a car. The next afternoon, as well as I remember, I gave him the check for $100.00. He told me he was going to Roanoke to see Mr. Funk and get it fixed. When he got back he said, "Well I got it fixed." Pete Buckner went with him from the house. This filling station was located out from Danville, in the country.

Cross-examined by Mr. YOUNCE (witness continues):

I judge about two and one half to three miles from Danville. I was living there and running the cafe for Charlie Martin. I had been running it for a couple months maybe at that time. I hadn't handled any whiskey, not a drop, hadn't sold any to any one. I was surprised when Charlie Martin told me they were going to indict me. I was much hurt about it. Charlie got mad. He didn't threaten me about it. I didn't tell anyone about having money in the bank. I don't suppose Charlie Martin knew about it. Charlie told me they wanted $200.00 and I should pay $100.00 of it. I told him I didn't have it, but that I could get it. He had not deposited money for me in the bank. He said he would have to pay the other $100.00, because my sister had sold whiskey. My sister is Charlie's wife. I had about $100.00 in the bank, I wouldn't say I paid out my last dollar. I gave Martin a check; I had a checking account. I turned this money over to Charlie Martin when I knew I was innocent of violation of the liquor law. Charlie Martin

brought me to Greensboro. If I had seen Mr. Funk before then I didn't know him. Charlie pointed him out to me. I never saw Mr. Funk after that time, until this trial. I recognized him as the man pointed out to me as Mr. Funk. I recognized him when his name was called as the defendant. All I know about this transaction is what Charlie Martin told me.

NICK VAUGHN, witness for the Government, being first duly sworn, testified as follows:

Direct examination by Mr. CARTER:

My name is Nick Vaughn. I live in Burlington, North Carolina. I lived there during the fall of 1928 and spring of 1929. I know Charlie Martin. I was engaged in the liquor business a little, about that time.

By Judge MEEKINS:

Q. How much money did you pay?—A. $150.00.

By Mr. CARTER:

I gave it to Charlie Martin. Charlie sent a car over for me and said I had a man working for me, that was caught, Mr. B. R. Long. I told him Long never worked for me. He said he was indicted, he had me for aiding and abetting. He said, "I can get you out for $150.00, so I told him "All right", and we stayed over there until ten o'clock, and he said he had to wait to come back to Greens-
12 boro to bring Funk. I saw a man there that night that Martin said was Funk. Mr. Funk and a lady and myself and Charlie and John Goodson came to Greensboro. He put the lady out and Mr. Funk came down on some street here in Greensboro, put me and Goodson out at Clegg Hotel and we waited three quarters of an hour; and Charlie came back for us, coming to the King Cotton Hotel. Charlie went in the hotel and he asked if I had the money with me. I saw Mr. Funk in the door. I said, "I will pay $130.00," and Charlie said, "I will pay the other $20.00." He turned and walked back in there. He gave me some kind of paper. He had Long charged with whiskey and me with abetting.

Cross-examination by Mr. HAMMER:

I don't know Long by that name. There never had no Long worked for me. I don't think I had ever aided and abetted. Lots of people hung around there. If I am not mistaken it was the night of January 9th, 1929, that Charlie Martin got the money of me, when I came to the King Cotton Hotel. I knew Funk was the man with us that night. I think it was the 9th of January. I think it was between eleven and twelve o'clock that night at the King Cotton Hotel. I was not under indictment for violating of liquor law at the time I testified. I had been punished about six years ago for four bottles of home brew. I was not under suspended judgment.

ERNIE ANDREWS, witness for the Government, being first duly sworn, testified as follows:

My name is J. E. Andrews or Ernie Andrews. I live in Graham. I lived around Burlington during the fall of 1928 and spring of 1929. I do not recall a transaction between Mr. Martin and Mr. Funk over on the highway there. I went out there later with Mr. Martin. Also to Mr. Funk's house in Greensboro with him, stating that he was going to see Funk. We went out to Funk's house. Mr. Martin introduced me to Mr. Funk as Mr. Craig. We stayed there for some little time. Mr. Funk and Mr. Martin was in the back part of the house practically all the time, talking, I don't know what about. I saw them later in Burlington. They had talked to me something about my being caught about a sale of whiskey. Said something about $150.00. Charlie said, "I think that will be the easiest way out, don't you think so?" and Funk said, "Yes; that is the easiest way out."

To Judge MEEKINS:

I did not pay the money. I didn't have it. I have seen that letter [indicating paper writing]. Mr. Martin brought it to my house one night after we had been over to Mr. Funk's house. I was asked to bring it to the other trial.

Cross-examination by Mr. HAMMER:

I do not remember what day it was that I came to Greensboro with Martin. We got there somewhere around eight or nine o'clock, at night.

13 I saw Mr. and Mrs. Funk and some of the children. I do not know which ones. I do not remember if I were already under indictment when they went to talk to me. I was indicted by Revenue Officer Mr. Trexler. Sometime prior to that time Martin asked me for that $150.00. Funk never asked me for money, and I never paid him any money. He never cautioned me or warned me in any way about violation of liquor law.

Mr. CARTER:

Q. Do you recall what Martin said, if anything, when he gave you the letter?

(Defendant objects. Objection sustained.)

WILLIE KIVETT, witness for the Government, being first duly sworn, testified as follows:

Direct examination by Mr. CARTER:

My name is Willie Kivett. I live in Liberty. I lived there sometime during the fall of 1928 and spring of 1929. I saw John Funk two or three different times, I reckon. I went to the filling station of Charlie Martin, with W. H. Langley, to Dowdytown. I saw Martin and two or three of his hands working around there.

To Judge MEEKINS:

We did not go away from there, we went into a garage and talked it over. Mr. Martin though he could get it stopped for $150.00. I saw Mr. Funk at Martin's filling station sometime before

Christmas. I passed him on the way up there, up from Greensboro to Danville, and he drove up while I was standing talking to Martin and sat there. I didn't see Langley give Martin a check. Larkin Kivett is my father.

I recall an occasion when my father, Larkin Kivett, paid Charlie Martin $100.00. I heard the conversation. He had a case against me and my father, and Mr. Martin thought he could stop it for $100, and he said he could stop it for $100.00. Father gave him $100.00. My father and I had been indicted. The money was for Funk—to get it stopped. I didn't see Mr. Funk. Martin said he was up the road waiting. I was prosecuted in that case.

Cross-examination by Mr. HAMMER:

The protection afforded by the $100.00 didn't do me any good. I do not know if Funk ever got a dollar out of that. All I know is what Charlie Martin told me, and that he got the $100.00. I have been convicted here in this court on four charges, whiskey, receiving stolen property, and served a term in the penitentiary, about twelve years ago.

RUSSELL LANGLEY, a witness for the Government, being first duly sworn, testified as follows:

Direct examination by T. C. CARTER:

My father's name is Henry Langley. In the spring of the yeaar 1929 and 1928 we lived three miles south of Liberty. I recall a conversation between my father and Charlie Martin in respect to paying off on account of a liquor violation, it was home brew. [Paper handed to witness.] That is my father's signature. I saw that check handed to someone. I heard the conversation between my father and Martin. My father is at home. He wasn't
14 subpoeaned here.

JOHN FUQUA, witness for the Government, being first duly sworn, testified as follows:

Direct examination by Mr. CARTER:

I live in Virginia, just over the North Carolina line. My business is farming, and I own a couple of telephone lines. I owned a telephone system in 1928, which supplied service to the Dowdytown section. I have the record of my company there. My records show that phone no. 34F03 was in John Goodson's name, date February 1929, I think. It was in a filling station, C. C. Martin's filling station. I did not have a telephone there listed, 39F12. I do not have one of that number. I do not know no. 1621, whose telephone that was, or what line it was on. I don't think I had 34F21 in January 1929. In December 1928, 34F21 was C. A. Frazier's. That is in the Dowdytown section. I had a number there, 34F05 in 1928 and 1929, Mrs. May Craig. I just suppose it was in Charlie Martin's restaurant, that was the only connection I know of.

By Judge MEEKINS:

I suppose the telephone was in his filling station.

(Answer continued.) He stayed there most of the time. According to my records there was a change made in 34F21, it was discontinued and a city phone put in place of 34F21. Frazier's filling station was two or three hundred yards from Martin's filling station. Martin had several filling stations that he was boss of, I think.

WEDNESDAY AFTERNOON SESSION, DEC. 15, 1932

Mr. P. B. ZIRKLE, witness for the Government, being first duly sworn, testified as follows:

Direct examination by Mr. T. C. CARTER:

My business is, I am agent for the Southeastern Express Company. I was chief clerk in December 1928. The paper you handed me is a Government bill of lading covering shipment from here to Charlotte, Mr. O'Steen's office. Covering shipment consisting of three bottles of beer, for Mr. O'Steen's office, going to J. D. Albright, Jr., at Charlotte. It was shipped December 18, 1928. We don't issue express receipts. I took this out of my file at the last trial and left it as court record.

No. T. 507834, Government bill of lading, dated Dec. 17, 1928, showing three bottles of beer from J. L. O'Steen, Deputy Administrator, received by the Southeastern Express Company, Greensboro, going to J. D. Albright, Jr., U. S. chemist in charge, Charlotte, N. C., signed "J. L. O'Steen, by John S. Funk", contained notations signed by P. B. Zirkle, C/C, is offered in evidence as Government's exhibit no. 14."

(Government's exhibit no. 14.)

15 Judge MEEKINS. The bottles were delivered from Mr. O'Steen's office. O'Steen's name was signed by John S. Funk. It was three bottles of beer, shipped by O'Steen.

E. E. OAKES, witness for the Government, being duly sworn, testified as follows:

Direct examination by Mr. T. C. CARTER:

My name is E. E. Oakes. I am assistant chemist, U.S. Treasury Department. I am located in Charlotte, N.C. My chief is J. D. Albright, Jr. I have a record—as Government Chemist—of certain beer sent to our office sometime about December 17th, by J. L. O'Steen, seized from one Henry Langley. I made examination of it. On December 18, 1928. It was received from J. L. O'Steen, by express—three bottles of beer (near beer), content .35, .47, & .45 per cent alcohol respectively, less than ½ of 1%, labeled "Henry Langley, R.F.D. Liberty. Date of violation, 10–20–28." Again, on April 5, 1929, received two bottles from Mr. O'Steen in person, Langley,

Liberty, N.C., 10-20-28. One contained 5.78% alcohol, the other 5.50%, beer, home brew.

(Defendant objects and moves to strike. Motion allowed.)

J. L. MOORE, witness for Government, being sworn, testified as follows:

Direct examination by Mr. CARTER:

My name is J. L. Moore. I was prohibition agent in 1928, latter part of 1928. I accompanied other officers upon a search of the Henry Langley home near Liberty, Randolph County. Found on that search 36 bottles of home brew and two or three kegs, 10- or 15-gallon kegs, about two or three spoonsful of whiskey. Dofflemeyer, Mr. Funk, Mr. Johnson, Deputy Marshal. I made a report of that transaction to my superior officers, December 29th. I did not make a report prior to that time, because I understood Mr. Funk was to make that report. Later Mr. O'Steen wrote me and told me to make that report [certain exhibits shown]. I recall attending court in 1928 at Big Stone Gap, Virginia. I spent the night at Roanoke. Mr. Funk accompanied me there. He stayed at the Patrick Henry Hotel. I did not. I did not see Charlie Martin there on that occasion. Funk said something about wiring for reservations over there. Our car was giving trouble. We broke down at Martinsville. He said something about wiring for reservations to the Patrick Henry Hotel, but didn't wire. I don't think he left me after that conversation. I did not see Dofflemeyer, prohibition agent, in Roanoke. I had conversation with Funk about making report in the Langley case. I asked him why he hadn't made a report of it, and he said that it didn't contain any alcohol percentage, he had it analyzed and it didn't contain any alcohol. As well as I remember, that was December term of court, the first day I was here, 1928.

16 I want to offer those exhibits and we can read them later. They are letters dated Oct. 31, 1928, from J. L. Moore, pro. agent, addressed to Hon. J. L. O'Steen, Deputy Adr., Greensboro, N. C., marked for identification "Government's Exhibit No. 14"; also letter dated Dec. 29, 1928, from J. L. Moore, agt., to O'Steen, Depty. Admr., Greensboro, N. C., marked for identification "Government's Exhibit, No. 14"; also letter dated December 28, 1928, from J. L. O'Steen, Deputy Administrator, addressed to Mr. J. L. Moore, prohibition agent, Kannapolis, N. C., marked for identification, "Government's Exhibit No. 16."

(Government's exhibit nos. 14, 15, & 16.)

Cross-examination by Mr. HAMMER:

I wouldn't say I was charge in that raid, and I don't remember if I swore out the search warrant. I had purchased some whiskey from Mrs. Langley on the 24th day of August, the same year. This was October. I don't think it was my duty any more than it was anybody else's. Mr. Dofflemeyer made purchases at this place. Not every time is it customary for the man who starts a thing of that kind to make the report. I could not make a report of a case

until there was an analysis of the beer made. We had to get an analysis of it to tell whether the could be indicted for possession of home brew. Mr. Funk said he would send it to Charlotte.

J. O. O'STEEN, witness for the Government, being duly sworn, testified as follows:

Direct examination by Mr. CARTER:

I am Deputy Prohibition Administrator in this district, and were in the fall of 1928. I recall something about a seizure of what purported to be home brew, from Henry Langley's premises sometime in the fall of 1928. Later I got reports on the analysis of that seizure. I carried some samples to Charlotte, of the Henry Langley seizure. This the 5th of April 1929. The Langley seizure had been in the U. S. district attorney's office. I carried two bottles; started with three, one broke on the way. Analysis was made of it. I think I was in the office when the analysis was made. The chemist is here. My records show the date of the Langley seizure in the first instance. It was October 20, 1928.

Cross-examination by Mr. HAMMER:

This liquor was put in a vault in the district attorney's office at that time. All beers brought from other places were labeled and placed in there. The agent making the seizure did the labelling. The bottles that I took were labelled by me, they came out of the crate labelled "Henry Langley"; liquors do not disappear frequently. I could not say that any disappeared.. I did not store them in that vault for that reason. I put them in there because the district attorney wanted to pack his supplies in there. We were using that vault as storage room for firearms, etc., and for liquor we brought in.

17 (Government objects. Objection sustained.)

I knew it came from a box. The rest of that beer was destroyed. I don't remember the date, or who destroyed it. Gavin and I destroyed one quantity. At that time we were not transporting all the seize liquor to Charlotte. I could not say how much we destroyed. I don't have to make report just how much, what number of bottles we destroy. There weren't so many seizures at the time I got this, but there were several.

Redirect examination by Mr. CARTER:

I think I know Mr. Funk's handwriting.

Defendant agrees, and the handwriting is admitted [indicating]. I designate three bottles labelled in Mr. Funk's handwriting, and two bottles by me.

Mr. E. E. OAKES, witness for the Government, recalled.

Mr. CARTER in direct examination:

In April, 1929 I received two other samples, designated "Henry Langley" beer. Mr. O'Steen brought his in person. The analysis

was 5.58% and 5.50% on the other, designated as "Laboratory Nos. 5526 and 5525." These were the first bottles I analyzed. These were received by me December 18, 1928, and the date is on them. That is my mark on there, on all three of them.

Mr. YOUNCE on cross-examination:

I received these three bottles on the 18th day of December. They are the ones that had less than ½ of 1%. I received the other bottles on April 5, 1929. That is the two bottles Mr. O'Steen brought. I only know them by the label. I don't know how he made it, or who. I do not know whether they came out of the same identical lot of beer.

J. L. O'STEEN, witness for the Government, recalled.

Direct examination by Mr. CARTER:

I did not make the shipment from my office through the Express Company to Charlotte. The usual custom was to carry it down in automobiles. It was not the practice of agents to use the Express Co. I can't say that I recall any other shipment by express.

Cross-examination by Mr. HAMMER:

No sir, I did not take every sample in person. Other agents do transport it that way. So far as I know that was the only one that went by express. Bills of lading are not furnished me to ship to the chemist.

18 Mr. E. E. OAKES, witness for the Government, recalled.

Cross-examined by Mr. HAMMER:

Q. Mr. Oakes, state whether or not it is a frequent custom for you to receive samples of spirits by express for which you have to sign a Government bill of lading for the agent to you.

(Objection on the part of the Government. Objection sustained.)

I don't know without looking up the records, if we have been accustomed to receive samples of beer by express, up to the time the Langley beer was received.

PETE BUCKNER, witness for the Government, being duly sworn, testified as follows:

Direct examination by Mr. CARTER:

I knew Charlie Martin in the fall of 1928. I was attending to the front of the filling station for him. I made a trip with him sometime during 1928 to Roanoke.

Q. Did he state to you what his purpose for the trip to Roanoke was?

(Defendant objects. Objection overruled. Exception no. 4.)

Q. Did you accompany him to Roanoke?

A. Yes, sir.

Q. Did he tell you what he was going to Roanoke for?

A. Yes, sir.

Q. What was it?

A. He told me he was going up there to try to get a liquor case smothered out—said he was going to pay Funk money to get him to smother it out.

Q. Did you go with him up there?

A. Yes, sir.

Q. Did you see Mr. Funk?

A. Yes, sir.

Q. Under what circumstances did you see him?

A. I saw him in an automobile.

Q. Whose automobile?

A. Mr. Martin's.

Witness continuing, testified: Martin and Funk went to Patrick Henry Hotel. Martin said, "I am going up there a second." Mr. Funk came out of the hotel. Martin was under the steering wheel, and Bowers and myself in the back, and they drove to Hotel Roanoke. Mr. Funk said, "Wait a second till I come back. I am going to see." We sat there about ten minutes then Funk came back and said, "Alright Charlie, come on, everything is alright." They went inside the hotel. Bowers and myself sat in the car. Charlie came back and said, "Everything is alright." Mr. Funk came back and got off at the Patrick Henry Hotel. We came on back to Danville. I saw Funk once at Charlie's filling station. I do not know Mr. Funk's voice over the telephone.

Cross-examination by Mr. HAMMER:

I was living at the time I went to Roanoke, route #5, Yanceyville Road, Danville. I was living at Charlie Martin's place. May Craig was working in the same place. I don't remember that I told this court on a former trial that I didn't know what Martin was going to Roanoke for. I have been staying around Charlie Martin's place for six months. I am not there now. I have not been convicted of liquor business, or felonious charges. I pleaded guilty once to liquor charges. I attended to the front, selling gasolene, but not
19 liquor. I don't know who sold it. I didn't see a soul. Not anyone there handled it or sold it for Charlie.

W. B. LITTLE, witness for the Government, being first duly sworn, testified as follows:

Direct examination by Mr. T. C. CARTER:

My business is telephones. I am connected with Southern Bell system. I was connected with Southern Bell in 1928. John S. Funk had telephone during that time. "His number was 3094-J." Witness exhibited certain telephone tickets. "Yes, sir, these represent long-distance telephone calls."

D. C. TREXLER, witness for the Government, being first duly sworn, testified as follows:

Direct examination by Mr. T. C. CARTER:

My name is D. C. Trexler. My business is special inspector of prohibition. My home is in Salisbury, N.C. I work in this section.

Work out of the Washington office. I heard a conversation over the telephone, by Charlie Martin, when I was present in a hotel.

Judge MEEKINS. He was talking to Mr. Funk.

Cross examination by Mr. HAMMER:

I did not know Mr. Funk's voice. I had never talked to him before that day.

CHARLIE MARTIN, witness for the Government, recalled.

I recall being present in a room in a hotel in Greensboro, in the presence of Mr. D. C. Trexler here and Mr. Osteen, in which he had a conversation with a party over the telephone. The party talked to was Mr. Funk. When I talked to him, Mr. Trexler and Osteen were standing by the telephone. I put in a call for Mr. Funk at his telephone number, and had a conversation with him.

(Defendant objects. Objection overruled. Exception.)

I told him about it. I asked him, "What is the matter?" He said, "Don't say nothing till I see you", or something to that effect. I said, "I will meet you." I think he said, "Come to my house," and I said, "No you come to the hotel."

Mr. CARTER. Q. Do you recall whether Trexler was taking down what was said.

(Defendant objects.)

Judge MEEKINS. That is all you remember. I wasn't but a few words?

Mr. CARTER. This was the only conversation I had with Funk while they were present.

Cross examination by Mr. HAMMER:

I was not asking Funk to come because I was working with officers. I asked him to come.

20 To Judge MEEKINS:

As to why the officers were in my room I don't recall whether I met Trexler over there. There wasn't any arrangements that I would call up Funk. As they were in my room, I was to meet Mr. Trexler there. I was to come over there and meet him, and as to why I come to meet him at that time, I had already told the fellow in Merrick's office about Funk. I don't recall what I told Funk. I know Mr. Trexler asked me what he said. I told him. He copied it on a piece of paper, not all of it.

D. C. TREXLER, witness for the Government, recalled:

Direct examination by Mr. CARTER:

I was present in a hotel when Charlie Martin had a conversation with some one on the telephone. I was close enough to hear what was said by the party on the other end. I would say I was 3 or 4 feet from the phone. J. L. Osteen and Charlie Martin were with me at the time. The substance of that conversation was as follows: I had asked Martin to confer with me about the investigation I

was making at that time of Mr. Funk. I had asked Osteen to come up there with me. It was in my room in Greensboro Hotel. Mr. Martin called Funk. I didn't know who he would call. Mrs. Funk answered the telephone. Mr. Funk wanted Charlie to come up to his house at 11 o'clock that night and told him not to say anything—to be quiet—say nothing, but come on up there; he didn't want to talk on the telephone. Martin said, "Why, is there something dead up the branch?" and he said, "Yes," and refused to talk to him about a specific matter over the telephone. Finally Martin asked Funk to come to Clegg Hotel. About the last thing that was said, I didn't get the exact last words, but at the end of the conversation Martin told him to meet him at Clegg Hotel. I took the telephone conversation down.

Judge MEEKINS. You took down what you heard—you could hear distinctly?

A. I took down what I heard. I could hear distinctly.

Cross-examination by Mr. HAMMER:

I do not say that I can take down every word, under certain conditions, under which I can. I won't say I can take down every word. I will take the substance of your conversation down. I heard the substance of the conversation. There was a statement or two at the end of the conversation I didn't hear very plainly. I asked Charlie what it was. I didn't put that down. Charlie Martin was not at that time trying to trip John Funk into some incriminating admission. I didn't know Martin was going to call Funk. I was investigating a case then against Funk. I had Martin as a witness to confer with me. I was not using him as a witness to catch the other fellow. As I explained, there was no understanding at all. I didn't tell Martin before that he would not be prosecuted if he would testify. He was indicted and subsequently tried and plead guilty. It was after this. He was guilty of some liquor violation. He was indicted after the time I was investigating this case. He wasn't under indictment at that time. My understanding was he was indicted in this conspiracy, that his *his* name was mentioned in this conspiracy.

21 J. L. O'STEEN, recalled.

Direct examination by Mr. CARTER:

Mr. Trexler and Charlie Martin were with me in a room in Greensboro in which Charlie Martin held a conversation with some one. I heard the voice but I could not say I recognized it. I was standing at the door fixing to leave when he called. I heard the man in the room that was doing the talking. I was just opening the door. Trexler was up close to him, he was writing all the time.

LELAND HOWARD, witness for the Government, being duly sworn, testified as follows:

I am chief clerk in the office of the Prohibition Administrator. I have the record of the expense accounts and charges of prohibition

agents. I have the records, the latter part of 1928 and early part of 1929. All expenses that are incurred in the transaction of their official business, reimbursements for their expenses are the expenses of prohibition agents.

Q. Will you refer to the record of your office in December 1928, and see whether or not there is any claim for expense of John S. Funk as prohibition agent for telephone calls and tolls in and around Downtown, Danville, Va.

(Defendant objects as immaterial and irrelevant. Objection sustained.)

W. H. LASHLEY, witness for the Government, being duly sworn, testified as follows:

Direct examination by Mr. CARTER:

In 1928 I lived in Graham, N.C. I was an office deputy in the sheriff's office in Alamance County. I recall calling up John S. Funk in respect to the liquor raid in my county. It was between four and five o'clock, I think. I was present on that raid. I saw Charlie Martin there. I later wrote John S. Funk a letter. It was a week or more later.

Showing the letter to witness, the witness replied, "I wrote the letter January 28th."

Cross-examination by Mr. HAMMER:

I called John S. Funk on the phone in connection with that raid. I did not tell him who was expected that night. I didn't tell him Charlie Martin or any of Charlie Martin's people were expected.

CHARLIE MARTIN, recalled.

Cross-examination by Mr. HAMMER:

At this point the following occurred:

Q. I want to ask you this question: At the last trial, if you didn't testify that before you met Funk in Roanoke you had no agreement that he was to let you operate a liquor business, that it was after you came back that you had an agreement. "It was at the time the marshall searched on a warrant at Martin Weaver's home, that is the time the agreement was made, in the back yard of your filling station on the Virginia side."

22 Q. The agreement you are testifying to in this case between you and your codefendant Funk, whereby you were to pay him money and he was protect you in the whiskey business, was in the State of Virginia?

A. Yes, sir.

Q. In your filling station in Virginia?

A. Yes, sir.

Q. Were those questions asked you and did you make those answers?

A. I don't know, sir.

The Government rests.

Defendant's motion for directed verdict

(Defendant moves to direct the verdict. Motion overruled. Defendant excepts. Defendant's exception no. #5.)

The defendant offers the wife of defendant Funk as a witness for the defendant.

(Objection by the Government. Objection sustained. Defendant excepts. Exception allowed, no. #6.)

Offer of wife of defendant Funk as witness

After the ruling of the court, as above noted, the defendant insisted that the witness, Mrs. Funk, be permitted to state under oath the substance of her testimony for the benefit of the record.

(Government objects. Objection again sustained. Defendant excepts. Defendant's exception no. #7.)

JOHN S. FUNK, the defendant, being duly sworn, testified:

Examination by Mr. HAMMER:

I am the defendant in this case. I was born in Rochingham County, Virginia, 1891, 41 years old my past birthday. I was formerly in the service as revenue agent, for seven years, less eight days. I had served under Mr. John A. Murphy, Mr. R. B. Sames, Mr. B. C. Sharpe, Mr. A. B. Strout, and various subordinates, R. Q. Merrick. I worked at different times in different States. They changed the divisions around several times. The divisions composed different States. When I first went in the service I was in North Carolina and Virginia, later in Virginia, North Carolina, and Georgia was in the territory, and later South Carolina. I gave my work constant attention. The nature of the work was investigating and raiding distilleries, and violations of the national prohibition law. I came to this immediate location to locate March 15, 1926. Was in Charlotte February 1, 1926, temporarily. I located here from that time until about the 1st of December 1928. I can not say the exact date. I positively do not take a drink, total abstainer. I have never been arrested or accused of any crime up to this time. The first time I learned to know Charlie Martin was when he came here as he stated with Gus Dowdy. Gus was on Stuart Price's bond. I had made the case. Stuart Price was skipping the country, or had jumped his bond, and Dowdy had asked me to go with him to Martinsville. Stultz was chief of police there, wouldn't make the arrest unless it was alright. He wanted me to tell Stultz he had a right to turn him in.

Q. And you went along?

(Objection by Government. Objection sustained. Exception no. #8.)

FUNK, continuing, said: I don't recall the next time I saw Charlie Martin. I had not at any time or place been in any conspiracy to

protect Martin, positively not. I had no agreement of that kind. I never protected him. I did not ant any time, or in any court in which he appeared in connection with any criminal responsi-
23 bility, ever do anything to relieve them from criminal responsibility, in violation of duties as an officer. I heard one of these witnesses testify they saw me at the King Cotton Hotel, and had a conversation with me there, but I was not there at that time and did not have the conversation. I was in Mount Airy, N.C., on that particular day. I have in my possession, hotel register showing the records, showing the time I registered, the room I occupied, and the day I was there.

(Objection by Government. Objection overruled.)

The proprietor of the hotel is here.

Q. Will you please show that to the jury?

(Objection by the Government. Overruled.)

FUNK, continuing says: This is a sheet from the hotel record of Blue Ridge Hotel, January 9, 1929. I know by my diary, that I entered the 9th and left on the 10th. Here is a record I do not understand. I see my name here, but it is not in my handwriting.

From my diary "January 9th, Winston-Salem, 1929. Wednesday 8:00 a.m., conferred with agents Lumpkin, Deputy Sheriff Morris, and Coley and others, then at 11:30 a.m., by Campbell City coach, 41 miles to Mount Airy, arrived 1:00 p.m. Saw Tilley and Sheriff Smith, secured information, made investigation until 7:00 p.m. Transportation request 201858, for bus fare $1.75." I did not leave Mount Airy that day. I spent the night there. "Mount Airy, N.C., January 10th, Thursday. Investigation. By Campbell Bus Line 10:30, 41 miles to Winston. Transportation request 201859." This is a diary I kept from which my daily reports were made.

By Judge MEEKINS:

You made entries at the time? You don't know how far Mount Airy is from here?

A. I would say 70-odd miles.

FUNK, continuing, says: It is forty miles I would say from Mount Airy to Winston-Salem. I think it is thirty miles from Winston to Greensboro, seventy-one miles in all. I was out of this district the night it was testified certain things occurred at the King Cotton Hotel. I got no money from Charlie Martin, with reference to the Ernie Andrews or Nick Vaughn proposition.

Q. Something has been said about Nick Vaughn and Charlie Martin coming to your house one night?

(Government objects.)

I did not know Nick Vaughn. He was never at my house. I didn't know him until the trial came up. I didn't know him until he came to the court room. I had no connection with Ernie Andrews. I had no transactions with Charlie Martin, for Nick Vaughn. I did not call up Charlie Martin in regard to some trouble his wife and sister-in-law got into. I didn't know of either of the ladies. Mr. Martin

was brother of Chief of Police Martin at Danville, a high-class gentleman.

Charlie Martin was his brother. He gave me information on Martin Weaver, gave me information about "Judge" Womack, gave information about the Johnson filling-station crowd. I raided the Weaver place. That had been moved. Searched all over the country for a still. At Weaver's place we found where the still had
24 been. I didn't know Langley, wouldn't know him now, if he were pointed out to me. Charlie Martin positively did not get money for me from Langley. I did not go up there with him. I was on the Langley raid, Agent Moore, Agent Dofflemeyer, myself, and Mr. Johnson, at that time deputy marshal. We found two cases of beer, capper, and a few drops of whiskey; seized the beer and brought it up here. That evening I met my wife out here, and Mr. Moore and Mr. Johnson took the beer and carried it in. I never saw it until I got three bottles and shipped to Charlotte. Moore came over here during December court, said they had been writing him about a report. There was no understanding. Moore and Dofflemeyer initiated the case. I didn't know about the case until they called me to go with them on the raid. I didn't even help carry the beer into the place. I sent it to the chemist. I sent it by express, as they had ben sending whiskey and beer there, on Government bill of lading. I have copy of bill of lading that I retained. Up until I went out of the service, I never heard of anybody carrying it over there, unless they were going anyway.

I did not put the meal and water in the bottles. In fairness to me and the Government, I went to get this beer. Miss Brock, clerk in the district attorney's office, gave me the key. Her desk was in front of the vault, I went in the vault, got the beer out, a colored man was along with me, a janitor. John Galloway was the janitor. There was two crates of beer from the Langley raid. There wasn't but one crate when I went in there. I got it out and locked the door and gave the key to Miss Brock. I asked the janitor for a box to ship it in. They got the box, helped me pack it with excelsior. I did not fix up any concoction.

I think I should be allowed to say something more about the report. I could not have made an intelligent report. Moore had made purchases there. I knew nothing about the search warrant. I didn't have anything to do with that, didn't execute it, couldn't have made an intelligent report. I don't know Larkin Kivett today, I did not go to his house, positively not. I never had anything to do with that. I never got any money of him through Charlie Martin or anybody else.

Judge MEEKINS. You did not go to his house?

FUNK, continuing, says: I never got any money of his, through Charlie Martin or anybody else.

Judge MEEKINS. It is untrue that Martin's sister-in-law paid you $200.00 to stop a matter against her.

FUNK, continuing, says. It didn't happen at all. I did see Charlie Martin, Martin came into Roanoke and gave me information on "Judge" Womack. He had been here the day before and saw my wife. I didn't see him. I did wire him that he could see me in Roanoke. I was particularly anxious to get "Judge" Womack, if it was true. I did not see Martin the day before. I wired him I would be there. I saw him at the Patrick Henry Hotel. I never went to Roanoke Hotel with Martin, and I didn't see Pete Buckner and Ed. Bowers. I went to the show that night. I have not at any time or any place or with any officers or officials tried to use my influence to prevent the prosecution of Charlie Martin or any one of those other men mentioned in connection with this case. I did not get money from Vaughn, $150.00, and none from Ernie Andrews. I positively did not tell Martin that I would let him know when the law was on the Martinsville road. I couldn't have done that, if I wanted to. I wasn't in the State of North Caroline from the 5th of July until the last day of July 1928. I was in South Carolina, Columbia and Charleston, and didn't return to this State until, I think it was the 30th day of July 1928. I was out of the State. I didn't even have my feet on North Carolina soil.

I went to Big Stone Gap, around there a week in commissionsers hearing, 220 miles the other side of Roanoke. Prior to July 5th, for three months I was working practically all the time through the southwest part of Virginia, from Middlesboro, Kentucky, down to Pennington Gap, through Wise County, southwest Virginia, in that section, under Mr. Alexander (who is here), deputy prohibition administrator of western district of Virginia. I don't think I even saw Charlie Martin during that time. I personally didn't. Mrs. Funk wrote me a letter over there about the $20.00 check. I believe I did see him at the March term of court. I did not write him any letters. The letter introduced, Mr. Funk wrote. I didn't even know Martin had that check. That was cashed by another party. He did not give me an automobile. I bought a little T Model Ford roadster. Paid him $20.00, but it was perfectly legitimate deal. If anything, I paid him too much for it. I paid all it was worth. Later I had it painted, and a new radiator and various other things. It was a legitimate deal.

As far as those telephone calls made to Dowdy relative to the Jim Riddley case, in which he was a Government witness, the district attorney, Mr. Garvin, assigned me to work with him on that case. The case was prosecuted in this court. I did have a telephone conversation with Martin. The first thing he said, as I recall it now, was "Something dead up the creek!" When he called me, he would use some such expression. He said to call him, that if they found him calling they would say he was a stool pigeon. He would tell me when to call him and I would call him. In this particular case he called up. Very few words were said.

Cross-examination by Mr. CARTER:

I called Gus Dowdy, concerning the Riddle case. I called about it, and called about his parole. I don't know the date of the trial, 1927 I think. I don't know if that is the only Gus Dowdy call in that bunch. I haven't looked them over.

Q. Asked by district attorney. "You are not with the Prohibition Department? When were you discharged?

FUNK (continuing). I was not discharged by the Prohibition Bureau because of the fact that Clay Fogleman, a bootlegger and now awaiting sentence, held my note. I did give Clay Fogleman's wife, right here in the courthouse, a note for $50.00. It rep-
26 resents money that I owed Clay Fogleman. At the time I gave that note to his wife, he had not been convicted and sentenced at that same court, to the Atlanta Penitentiary for violating the prohibition law. He was here for trial, and was in custody, later being convicted. I testified against him. All the cases came up at the same time, and I testified in that trial. I borrowed the money from him, when he was driving for us. Fogleman was not on probation. I had caught him myself. He was driving us at the instigation of Captain Merrick and Frank A. Linney, United States attorney then. He had been arrested, I had arrested him. I gave Fogleman a note when he loaned me the money. I gave his wife a duplicate of it. I do not know what Fogleman made a day. He made so much per mile, I think ten or twelve cents a mile. At the time he was driving he was not one of the most notorious liquor runners in this section. Even after he quit driving for me, he drove for O'Steen. I don't think he was handling any liquor at all. I paid Mrs. Fogleman what interest I could on the note. I expect to pay it. I borrowed the money when he was driving for us. Mr. Sharpe loaned me some money, and he called on me for the money when the administration changed. Fogleman was at the house at the time, and offered to loan me the money. I borrowed it. He drove for James A. Clifton, Johm W. Smith, Captain Merrick, and several times for O'Steen, and some for Trexler. At least they went with him. I know he was arrested in High Point in possession of a stolen automobile, but that was afterwards. I don't know when I borrowed the money. He lost the note. The nearest I can tell you: Jack Tracy and I were on the Virginia line with him watching for cars reported to be hauling liquor. On that night there was a wreck the other side of Reidsville. I do not know how long it was before I gave him the new note. I can find those papers at home I am trying to tell you. I told you as near as I could tell you, it was when Merrick took over the administratorship of this district. Mr. Blalock drew it up, a lawyer. I delivered the check out in the hall, to her (Mrs. Fogleman).

I was at Mounty Airy on January 9th. I was also there on the 10th. I came to Winston-Salem at noon, and stayed there. My diary

doesn't show that I came back to Greensboro that day. No, I do not know anything about this ticket. (Handed ticket.) It wasn't made from my phone. It says 5050. I don't recall now. Yes, it is the U-drive-It number. That is my name on there. I do not know whose number 1621 is over at Danville. I could not make that call from 5050 to 1621 on January 10th, because I was in Winston. It might have been charged to me, I sometimes did not see my bills. Mrs. Funk paid them sometimes. I was in Winston the 11th. I don't know who made that call when I was in Winston. I was in the Winston on the 12th. I was at home I guess on the 13th. I might have had a telephone message to Danville at 1621 on that occasion [Handing witness paper]. I didn't make any of these tickets. This is my telephone number 3094-J. This is changed, it says "Funk, Danville, 1621." I don't know what the phone number is. On January 23rd, I was in Charleston, S.C. Left Charleston 1:00 a.m. by Southern, 320 miles to Greensboro, N.C., arrived 12:35 p.m. That was Wednesday. On Thursday "Arrived at 12:35, By private auto 7 p.m with Hoffstickler, 30 miles to point near Burlington, joined Sheriff Rudd and deputies, lay in wait for autos reported transporting liquor, returned Greensboro three a.m." This was the 23rd of January, I was in Charleston, S.C. I left there in the morning.

27 This ticket is dated January 23, 1926. It is from Funk, from 3094-J to Charlie Martin, 5:25 p.m. I didn't make that call. I guess I paid it, if it was charged to me. I made calls to Charlie Martin, several times, about the title to this automobile. I don't know what phone number 1621 is, but there are other people at Danville, besides Charlie Martin. I made call to Charlie Martin—I don't deny. I wouldn't say I associated with him promiscuously. I did take him and wife to my mother's home in Virginia. I am not positive, but I think it was January 17th, and came back on the 18th. I only have "On annual leave three days." I might have gone the 18th, back the 19th. I wouldn't say which. We were gone two days. It was just five days after we got back from this trip, that I waylaid him at Burlington and made the raid of the 23rd.

I don't recall if I had any communication on February 1st and 2nd. This ticket says to "34F03" both of them, February 1st and 2nd. I don't know whether I had any messages, February 1st and 2nd, 1929, nor February 5th, to 34F03. I was in Greensboro, yes sir. This ticket is from Funk to 34F03, on January 31st, 3049-J and 34F03. I have seen this pistol. I don't know where I first saw it. I bought it. It was a perfectly legitimate deal. It was mine. I traded it to Charlie Martin for a .32 Smith and Wesson. I can not tell you the date. It has been four years. I didn't make any note of it. Charlie Martin never visited in my home; he offered to take me to my mother's house. I went up with him, paid the gas bill. That is all there was to it. There wasn't a thing wrong with the trip. He didn't give me the automobile. I don't know the date of buying it, until I look it up. I haven't the titles to the car now.

When I disposed of the car I disposed of the title. I would not be positive of the date. It seems to me it was about the 11th of January. I don't know. I made a visit up to my mothers. Since then I learned that he was in the liquor business. I don't know how long I had known him before that time. I went with Gus Dowdy up to Martinsville. I don't recall the date. My only negotiations with Martin was he giving me information—he was giving others information at that time. I did not make cases against Dowdytown on the information he gave me; that was not in my territory, Martin was giving me information on bootleggers and blockaders. He did me just as he did when he took other agents from Capt. Merrick's office, and made cases with me. He testified he went to Richmond to see Merrick, so I judge he gave other agents information. I didn't know any time he was giving me information he was giving others information at that time. I did not inquire from anybody over around Danville as to who Martin was and in what business he was engaged in. I found I could rely on him. I caught Johnson and his son. They were prosecuted in this court. I never made any case against Womack. He lived in Danville. I don't recall if I made any other cases, except the Johnson case, during the months that Martin was giving me information. I did not know Gus Dowdy was engaged in the liquor business when I went with him to Martinsville. Had I gnown it I would have prosecuted him. I knew Gus had the reputation of being in the liquor business. I did not know it.

Q. Don't you know you arrested Gus in the prosecution of Jim Riddle, highjacker?

Ans. 165 gallons.

Q. Yes.

A. At the instigation of your office.

Q. You knew Gus was in the liquor business?

A. Yes, sir; certainly.

Q. Two years before that time?

A. Gus had the reputation of being the liquor business. As to knowing it, I didn't know it. I made the case against Stuart Price, another bootlegger. I did not make a report of my official transaction to my office.

28 Yes, I went to accom'odate Gus, and because of my interest in the Price case. I wanted to see him caught. I made investigation about Price while there. I didn't make a report to the office about it, because I wasn't doing it for the office. Dowdy asked me to see him, and I didn't refuse. Jimmy Moore asked about these reports at court. There was something said about my report in the Langley case, and the beer analysis. There was something said about it. It was four years ago. It was a matter of Moore passing the buck to me. After Moore said, "You are here at home, will you send that beer off?" I agreed to do so. I sent three bottles to Charlotte, and he made the report. I didn't get the analysis back, it went to the office. I don't recall if I ever asked about it after that.

It wasn't my place to make a report. I sent the beer as an accom'odation to Moore. I think I went down to the express office in a car to take it. I had numerous cases; I shipped to the chemist to Charlotte. I could not name the particular cases. I happened to keep the bill of lading in this case. I do not have any more here, I expect I have more, but not here. I saw Martin in Roanoke; I sent him a wire.

He didn't talk to me personally. He left the word here for me that he had information for me. I didn't wire him to come.. He asked that I wire where I would be. He left word for me at my home. I think I wired him after I got to Roanoke; I was in Roanoke. I wouldn't be positive about that. I went to Roanoke with Jimmy Moore. I didn't go by Dowdytown because it was away out of the way. I saw Martin and talked to him after he go there. He gave me a report on "Judge" Womack. I didn't know "Judge" Womack was on Charlie's bond. I only know it now, because I have your word for it. I didn't see Buckner, and Martin did not have a transaction about May Craig and his wife. I jumped in his automobile and took his key out, when I went down there. I didn't go in the barn. I did not see him after we left Burlington. He positively did not come to my house. I don't think I saw him any more until after this case. I don't think I called him over the telephone after the 23rd of January. I don't know if I swore in the former trial that the title of the automobile was dated the 28th of January. It was not delivered to me after the 23rd of January, not after the trip to Burlington. I did not swear to it in the last trial, because I positively had the car before I went down home. I didn't know Mr. Langley. I knew Mrs. Langley, at least she was at the house when we raided there, but he was not. I don't know that I could recognize her. I had this car when I went to my mother's in Harrisonburg, but I could not have gone in it. I said I had no way. I had the car fixed up after that. I gave $20.00 for it. Martin said he had one he would take $20.00 for; I didn't know it was as bad condition a sit was. I sent for it. It migh have been in the garage; I sent Huffstickler for it. I don't know that I had to pay $16.00 to get it out of the garage. I know Ernie Andrews and Nick Vaughn. I did not at that time. I didn't see Andrews when we raided. I didn't see Nick Vaughn. I never have seen Morgan Kivett until today. If so, I didn't know it. I didn't find it out that everyone of them had the reputation of being in the liquor business.

I later transferred to Winston, as well as I recall, the 14th day of June 1929. I would say I was there five or six months.
29 Made quite a few cases, a bunch in Stokes County. I said I didn't think Charlie Martin cashed that $15.00 check for me. I don't recall to whom I gave it. I wasn't at Dowdytown. I may have given it to Gus Dowdy, somebody I got to cash the check for me. It came back *im*sufficient funds. I was away from home. We both checked on the same account, that was why the check came back. I haven't seen the check but I am sure it is the one I signed.

I never made a case against Charlie Martin, Gus Dowdy, Clay Smith, Rube Frazier, nor Buford Gardner. I did not make a case against Dowdytown, it wasn't in my territory. I was over there asking information from Charlie Martin, all around North Carolina, that was my territory.

Redirect examination by Mr. HAMMER:

FUNK, continuing, says: There was no liquor in that car when we went on the trip to my mothers, if there was I didn't know it. I didn't search the car. I wouldn't have any use for it. I didn't drink it, positively I don't drink. He did not show me pits where he had 155 gallons hid at his home. I never saw a pit over there in my life. I heard there was a pit in the garage, after Mr. Gatewood raided him alone in March 1929. I did not know the real character of Charlie Martin, when I sent to my mother's home in Rockingham County. He seemed to be a likeable fellow, I took him at face value. It was some little time after I got the car, until I got the title to it. I phoned repeatedly to get the title. I called over there to Charlie about it.

Q. Do you know whether your wife called over there about that car?

(Government objects. Objection sustained. Exception no. 9.)

I phoned several times, and told her to call about the car. These phone calls would go out on your bill, naturally. I do not recall telling her any other time, except I do recall on this trip down there, they hadn't come, and were to be there early in the morning. I didn't check to see how many long-distance calls went from my place to Dowdytown and to Charlie Martin. I didn't count them. I don't think I ever charged up any of these telephone call as official business and got reimbursed. I would place a call, and didn't charge them to the deputy sheriff. I would take the charge. The would say, "I will call you later." I am not permitted under the rules and regulations to charge my personal calls to the Government pay roll.

Q. The diary that you keep, is one that explains your charges and expenses, when and where you are at all times, and that is furnished to the Government how often.

(Objection by the Government. Overruled.)

We make a daily report. Sometimes they accumulate several days, but they were supposed to go each day to the office. The copy of my data is embraced in this report.

(Objection by the Government. Overruled. Exception.)

I had a right to charge to the Government any official business and get reimbursed for it.

W. C. ANDREWS, witness for the defendant, being sworn, testified:

Direct examination by Mr. YOUNCE:

I live at Mount Airy, N.C., have lived there eleven years. In January 1929, I was manager of the Blue Ridge Hotel. I was there in active charge, on that date. I only know John S. Funk as I remem-

ber this occasion of his being in Mount Airy. Counsel handed witness paper, and he continued: This is the daily register sheet January 9, 1929. This is the original sheet of that date. John S. Funk registered at my hotel on that date. He signed the register sheet. It has been a rule for many years, I would relieve the clerk from twelve to one o'clock. It was between twelve and one. That is my writing. My recollection is that he came in during the dinner hour and registered. This shows that he only registered for a room. I was in charge at the time he signed up. I think there was a cash sheet turned in with that. That is the cash sheet [indicating]. That is marked "Defendant's Exhibit D", the cash report. The register shows for room and one meal. It doesn't show what meal. It might have been for supper or breakfast the next morning.

Mr. CARTER on cross-examination:

I don't recall that there was anyone with him. I don't know how I can remember this man out of the others coming into my hotel, but his smallness of size is one thing.

L. C. HUFFSTICKLER, witness for the defendant, being sworn, testified as follows:

Direct examination by Mr. HAMMER:

I live on Spring Garden Street, in this city, Greensboro. I went to Danville to get the automobile that John S. Funk had purchased from Charlie Martin. I don't remember the day. It taken me from 7:30 to after 9:00 o'clock to get it started, a couple of hours. I did not pay anything at all. I saw Mr. Funk pay Charlie Martin money on account of that car. It was $20.00. The payment was made out from Danville a few miles. I am an automobile mechanic. I am no relative of Mr. Funk's. I have been in court about drinking. I have never been charged or convicted of any crime. I spent the night of January 23, 1929, at Mr. Funk's house. No one but home folks and myself were there that night. I don't know how many there are in his family. He has children, and his wife was there. Charlie Martin did not come there that night with any other person, that I know of. No, sir. I slept just across the hall from Mr. Funk. My door was closed. I turned in sometime after twelve o'clock that night. I didn't see anybody there at all.

Cross-examination by Mr. CARTER:

I am a married man, and was at that time. I lived 1904 Spring Garden Street. I didn't live close to Mr. Funk. It was a couple of miles; I was boarding with my sister, near the ball ground on
31 Lee Street. My wife was in Wadesboro when this happened.
I was not separated from her, she was at her mother's. When this happened I was staying on Davie Street. Part of the time I was staying at a little hotel on Davie Street, and part of the time with Mr. Funk. I didn't have any special place to stay then. That is my signature [indicating—paper presented]. I can swear to this statement. I moved after this happened, 757 Chestnut Street, just

a week or so after this happened. Twenty dollars was paid for the automobile. He gave him $20.00. He gave him $20.00 and then gave him $5.00 to pay for the repair bill on the springs. You didn't give me time to answer the other day, to tell about the $5.00, $20.00 to start. He asked him about the repair bill on the springs. I may have seen Charlie Martin when I went for this automobile. I don't know.

Mr. CARTER. I ask this affidavit being exhibited to the witness be offered in testimony.

(Here the following colloquy occurred.)

Q. Mr. Hoffstickler, I ask in this affidavit if you didn't state that he paid $20.00 for the car and $5.00 for the repair bill, and paid it to Martin?

A. I guess so.

Q. And this statement was made in July 1929, that is the date.

Judge MEEKINS:

Q. Do you remember under what circumstances you made this affidavit?

A. I heard the conversation between Mr. Funk and Martin. He was to pay $20.00 for the car.

Q. Who got you to sign this affidavit?

A. I declare I couldn't tell you; I don't know.

Mr. CARTER:

Q. Mr. Hoffstickler, you are drinking whiskey this evening, aren't you?

A. No, sir.

Q. You do drink?

A. I take a drink occasionally.

Q. You went with Funk on the raid to Burlington?

A. Yes, sir.

Q. And spent the night on a lounge in his house?

A. On a davenport.

Q. You don't know who went in there that night?

A. Didn't nobody come in there, as I know of.

N. C. ALEXANDER, witness for the defendant, being sworn, testified as follows:

I live in Roanoke, Virginia. I am deputy prohibition administrator, western district of Virginia, the same position that Mr. O'Steen occupies now. In 1928 John S. Funk worked for me. In February or May sometime he was doing some undercover work in south Virginia for me. I have known Mr. Funk since the fall of 1923.

Q. What was his character as an officer?

(Government objects. Objection sustained.)

32 Q. What is John Funk's general reputation among the people who know him, among the officers with whom he worked, first as to truthfulness?

(Government objects. Objection overruled.)

A. His character is good, so far as I know. I never worked in this office here. Both O'Steen and myself worked under Mr. Merrick. The instructions issued by Mr. Merrick's office, as to how these samples shall be sent to the chemist's office are, get them to the chemist, send them, if not, send them by bill of lading attached.

Cross examined by Mr. CARTER:

These matters are handled by the deputy administrator in the district. After Funk did undercover work, I didn't see him for two years, I believe.

Miss RENA SMITH, witness for defendant, being sworn, testified:

Direct examination by Mr. YOUNCE:

I live at 302 Woodland Avenue, in Westerwood, in Greensboro. I have lived in the city 4 years. I know Mr. Funk, he lived across the street about a year. I knew his general reputation in that neighborhood. It was good.

Cross examination by Mr. CARTER:

He lived near me when he first came to Greensboro, 4½ years ago. So far as I know, the general reputation of which I have spoken is his reputation with these people in general.

A. TILLEY, witness for defendant, being sworn, testified:

Direct examination by Mr. YOUNCE:

I am assistant district attorney. I live at Mount Airy. I do not recall where I was about January 9, 1929. I recall that Mr. Funk came to Mount Airy along about January or February. I can't say just when. He came to see me. I know he came up there and talked to me about some sort of violation, I think it was about the seizure of an automobile.

Judge MEEKINS. That is the only time you recall seeing him?

A. Yes.

D. H. DOFFLEMEYER, witness for the defendant, being sworn, testified:

I am Federal prohibition investigator. I have been prohibition investigator eight years. I worked under Mr. Fullwaller and Captain Merrick. I know John S. Funk. I have worked with him. The first work I did in 1924 was with Mr. Funk, and I was associated with him from that time as long as he was an agent. I am still in the service. I never caught May Craig or Mrs. Charlie Martin, as an undercover man, and got liquor from them. Funk never approached me with any proposition to suppress any kind of
33 prosecution against those people. At times I was closely associated with him in his work, when in the service. I was on the Langley raid, when the Langley place was raided, with Funk and Moore. We found some beer or home brew and a small quantity

of liquor, very small quantity, in a jar. We brought the beer to the postoffice. Mr. Moore carried it in the post office, if I recall. Mr. Moore and myself initiated that search and seizure. I don't recall any specific instructions about what to do with reference to making reports of a raid, or seizure, to the office. I only know from experience.

Mr. CARTER on cross-examination:

I worked in the fall of 1928 at undercover work. In Alamance and Caswell counties. Earlier I worked around Greensboro, also in Salisbury. I don't think I went in Caswell. I was in undercover work the latter part of 1928. While Funk was with me he never approached me toward suppressing any prosecution against any man at any time or in any way.

December 16th, 1932, 9:30 o'clock a.m.

JOHN GALLOWAY, witness for the defendant, being sworn, testified:

Direct examination by Mr. YOUNCE:

My name is John Galloway. I am janitor in the Federal Building. I was janitor here while Mr. Funk was prohibition agent. I remember packing three bottles for him one day. He came there and asked me if I had a little box. I told him I didn't know, might could find him one, and I asked how big a box he wanted. He said he wanted one large enough to hold three bottles of home brew. We packed it up. It was taken from the safe in which the beverage were kept, yes, sir. He got it out of the district attorney's office. It was a little corrugated box; as near as I can remember, held about three bottles of beer. When it was packed I turned it over to him, and asked him what he was going to do.

(Objection by the Government. Objection overruled.)

He said he was going to send it to Charlotte to have it analyzed. I told him it wasn't necessary to send it to Charlotte. I could tell him how much kick there was in it. I didn't sample it, he wouldn't open it. He didn't let me test it.

Cross-examination by Mr. CARTER:

I lost interest in it after it was packed. That was the only beer I ever helped him pack. He got it out of the district attorney's office, he came out of there with it. I could not recognize those bottles, they all look alike to me. I just started to say that all the prohibition agents when they are in this office, we had to furnish boxes to them to ship whiskey and stuff to Charlotte.

In answer to Mr. CARTER:

I have furnished other prohibition agents boxes, very often. Before this time, and since this time, as long as they stayed in this

office. As long as Mr. O'Steen's office was in here. They would come down and hunt boxes. I helped them pack the boxes. I don't know what they did with it.

34 Miss RENA SMITH recalled.

In ans'er to Mr. Hammer said:

Yes, I testified yesterday that I lived close to Mr. Funk, in the early part of 1929, on Chesmut Street. I recall when he and his wife went up on a visit in Virginia I was sitting on the porch one night, while he was gone, and a light was in the house over there. I knew the family was away, the keys were left with us. When I saw the light, I phoned the police. Officers came but I don't know who they were. I sent the key which Mr. Funk left with me, over to the house by a nephew and he met them and they went in the house. The key was left with me. The light had not been burning theretofore. The lights burning were something unusual.

(Government objects. Overruled.)

I can't say I would know Messers. Floyd and Hayworth, police officers. I gave the key to the officers, because the house had been entered once before, when they were went away, and he left the key with me. I gave the key to one of my nephews, Roger Smith was his name, he gave it to the officers, and they went in, and searched the house. My nephew is not a witness here. I can't tell what he said. This was the middle of July 1929.

Tender of K. M. Brimm and Mrs. Frank McAdoo

Mr. Funk tenders referee in bankruptcy, Kenneth M. Brimm, and Mrs. Frank McAdoo as character witnesses for cross-examination if it is desired.

REBUTTAL TESTIMONY

VIOLA MAYS, witness for the Government, being duly sworn, testified:

Direct examination by Mr. CARTER:

I am a telephone operator. I was working at the telephone office January 1929, Greensboro, N.C. I made tickets when long-distance calls came in [witness handed paper]. I made that ticket or handled that call. I remember Mr. Funk putting in a call.

(Defendant objects. Objection overruled.)

Judge MEEKINS:

I know Mr. Funk, he said his name was Funk, when the call was put in. I do not know his telephone number.

By Mr. CARTER:

He was calling Danville, he was calling Charlie Martinl?

To Judge MEEKINS:

I have no independent recollection of that call except as I see it on there [paper].

Answering Mr. CARTER, she said: I would not know his voice over the telephone. I don't know his telephone number.

35 ED. BOWERS, witness for the Government, being sworn, testified:

Direct examination by Mr. CARTER:

My name is Ed. Bowers. I live in Danville, Virginia, the latter part of 1928. I knew Charlie Martin at that time, know Charlie pretty good. I did not sell whiskey for him. I run a restaurant in Danville at that time. I went with Charlie Martin from his place to the station to meet a train down there, and met Mr. Funk and a lady and went to Charlie's filling station. I recall seeing Nick Vaughn there on that occasion. It was along in January or February, I think, I am not sure. In 1929 I think. I do not know how long they stayed at the filling station or what became of them that night. I have never been at the home of Mr. Funk. As to what occurred that night, in the filling station: As well as I remember, Charlie Martin had a fruit jar of whiskey in a safe back there in the back. I remember that we came from the station and Charlie opened the safe and there John Goodson, and Nick Vaughn and three or four of us there, he gave us all a drink. Mr. Funk was there. I recall a trip with Martin to Roanoke. We saw Mr. Funk. Charlie went into the Patrick Henry Hotel and came out. He drove up to Hotel Roanoke. Pete Buckner and I sat in the car. They went in the Hotel Roanoke, and stayed about thirty minutes, came out and we drove back to Patrick Henry, and Funk got out. We came on back over to Danville.

To Mr. Younce on cross-examination he replied:

I have known Charlie Martin about seven years. We are good friends. We were not associated in business. At that time I had been running a restaurant in Danville five or six years. I didn't sell any liquor at all. I have been convicted on charges, I have been convicted of drinking lots of times. Probably more than twelve or fifteen times. Martin furnished me the liquor, sometimes, but not all. I could have five gallons on hand to take care of myself, but didn't. I never was convicted of anything else.

Q. You have been in the Christiansburg jail, haven't you?

(Objection by the Government. Objection overruled.)

I was charged with crime, and place in the Christiansburg jail. and was convicted.

To Judge MEEKINS:

The charge was driving a car under the influence of whiskey. I never had any trouble in court, except from the use of whiskey.

To Mr. Younce he replied:

The only time I saw Mr. Funk at the filling station was that night we met him at the train. That was after the trip to Roanoke, four or five months, I think, something like that I am not sure. We met the train down at the station in Danville. There was a lady with

Mr. Funk, I don't know if it was Mrs. Funk or not. It was dark. It has been three or four years ago, I couldn't recognize the lady.

She sat in the car. The railroad station was lit up, but there
36 are no lights on the side there in Danville, where the car sat.

I didn't recognize the lady. I know Nick Vaughn, have been knowing him four or five years. I do not remember anything in particular that was said or done on that occasion. I went back afterwards and took a drink. Nick Vaughn, John Goodson, a boy from Norfolk by the name of Larry, Charlie, and myself. Mr. Funk was in the filling station. I don't remember whether Funk was in the back in there or out in the front. I don't mean to say that he took a drink of liquor, because I could not say he did.

CHARLIE MARTIN recalled on rebuttal evidence.

Direct examination by Mr. CARTER:

It is not true I gave Mr. Funk certain information or made certain reports to him about "Judge" Womack on a trip to Roanoke. "Judge" Womack, at that time, was on my bond for $6,500.00, and I had just bought a place from "Judge" Womack, and I owed him; I think it was, when he sold me the place I paid $100.00 down and I owed him the balance. We hadn't fixed any papers anything about the place. The telephone calls and visits to me were not on account of information I was giving him. I never gave him any information on bootleggers, blockaders, and other people in the liquor business. Johnson was eight or ten miles from Dowdytown, on the county line. I was on the one line—he was on the other. I just had the privilege of using phone number 1621. It was in Frazier's name. It is generally known as to who was in the liquor business at Dowdytown.

(Defendant objects and moves to strike. Sustained.)

Mr. Funk told me. We were in Rube Frazier's filling station. He was there to get the brandy. He came to me and told me that Rube told him I had this brandy. I said, "Yes; I have it." We were in the filling station at that time.

(Objection. Sustained.)

Funk knew Frazier. He knew as well as I did who was selling liquor from the names he called. He didn't call names that wasn't selling. He called them all, he knew them personally, he called Frazier. Dowdy and others had the use of this telephone, no. 1621.

(Defendant objects. Objection overruled.)

There was liquor in the car when Mr. Funk and I sent to Harrisonburg, and he knew it because he told me he didn't want to take it to his home.

Martin, in answer to Mr. Hammer on cross-examination, said:

I broke in a filling station; yes, sir. I got four years for that. I have been arrested and convicted on two occasions since the former trial here. I have been convicted twice. I am not serving a term now; they released me the other night. I went home; the jailor released me. I don't know whether or not I have to go back.

37 Mr. Carter questioned witness, and received the following answers:

In 1921 I was given four years. That was before I knew Funk. I am thirty-four years of age. Four years of it have spent in the pen.

MACK FLOYD, witness for the defendant, being sworn, testified:

Direct examination by Mr. GEORGE A. YOUNCE:

I am an officer in the police department of Greensboro. I recall being called to the home of John S. Funk, as police officer. I went to his home. I don't recall the date, sometime before the first trial of this case. He was not at home. Mr. Hayworth, another officer, and myself went there on a call. Someone called and said there was a light in Funk's house. We went out, and the house was locked and the light burning in the front left-hand room. We could not get in. We borrowed a table knife from one of the neighbors and slipped between the lower and upper sash and moved the lock back and went in. We didn't find anyone in the house, but it appeared someone had been in. The drawers to the dresser were open and papers over the floor, general disorder, kind of disturbed, some linen on the floor that had been drug out of a closet. We did not find anyone there.

Cross-examination by Mr. CARTER:

This all occurred before the hearing. I don't know about the prosecution. I think it was sometime during the summer of 1929. I do not know how long Funk had been gone from his home.

Motion to dismiss and for a directed verdict

And this being all of the evidence introduced on behalf of the United States and on behalf of the defendant, Funk, the Government rested and thereupon the defendant, Funk, did likewise. And at the close of said evidence in the case the defendant, Funk, again renewed his motion heretofore made at the close of the case for the Government to dismiss the prosecution; and further moved for a directed verdict of not guilty; which motion the court denied; to which action of the court in declining to sustain said motion, and directing a verdict as prayed for, the defendant, Funk, excepted. Defendant's exception no. #10.

Motion to set aside verdict and for a new trial

And thereupon, the court, after instructing the jury, and after arguments of counsel, and after the jury had rendered a verdict of guilty, and before judgment thereon by the court had been rendered, the accused, John S. Funk, by counsel, moved the court to set aside the verdict of the jury and grant him a new trial upon

the ground that the verdict was contrary to the law and evidence.

38 Which motion the court overruled; and refused to set aside the said verdict and grant a new trial; to which action of the court the defendant, by counsel, excepted. Defendant's exception no. #11.

Motion in arrest of judgment

An thereupon, the defendant, John S. Funk, by counsel, moved the court in arrest of judgment.

Which motion the court likewise overruled; and to which ruling of the court, the defendant, John S. Funk, excepted. Defendant's exception no. #12.

Order settling bill of exceptions

To all of which several rulings of the court heretofore mentioned the defendant, John S. Funk, excepted, and tenders this his bill of exceptions, and prays that this may be signed, sealed, and enrolled, and made a part of the record in this cause; which is accordingly done, this the 28th day of April, 1933.

I. M. MEEKINS,
U.S. District Judge.

Service of within and foregoing bill of exceptions accepted. April 12, 1933.

THOS. C. CARTER,
Asst. U.S. Attorney.

[File endorsement omitted:]

39 In United States District Court

Judge's charge to the jury

GENTLEMEN OF THE JURY: The defendant, John Funk, stands indicted on a bill of indictment charging that he, together with one or more persons, entered into a conspiracy to commit a crime which is denounced by the statutes of the United States.

A conspiracy is an agreement between two or more persons to do or commit, or perform an unlawful act. There can be no successful prosecution of two or more persons for having entered into a conspiracy to do an unlawful act, unless and until there shall have been performed, after the conspiracy has been entered into, one or more overt acts by one or more of the conspirators, in the furtherance of the consummation of the conspiracy. To illustrate: Two or more citizens of Greensboro may conspire together, that is, agree together to meet at the entrance of this court room tomorrow morning to assassinate the clerk of the court as he enters his office. The conspirators separate, and nothing further is done. There is no crime committed. But if after two or more citizens of Greensboro agree

together today to meet here tomorrow morning at nine o'clock to assassinate the clerk of the court as he enters his office, that is to kill him, and after they separate, one of the conspirators goes to a hardware store and purchases a pistol for the purpose of executing or carrying out or consummating the crime, then all three would be guilty, although nobody was ever shot and no attempt was made to shoot or attempt to kill the clerk, and although one of the conspirators might not have known that the other conspirator bought the pistol. In this case the Government alleges that there was a conspiracy between the defendant, Funk, Martin, and others to violate the law of the United States, and that in furtherance of the conspiracy, Funk, the defendant, committed one or more overt acts in connection therewith. In other words, two or more persons cannot be prosecuted for imagining a crime, or for agreeing to commit a crime, for entering into a conspiracy to commit a crime unless one or more of the conspirators do something to carry out the conspiracy or agreements, by way of an overt act. The burden of this case is on the Government to satisfy the jury beyond a reasonable doubt; first that there was a conspiracy between the defendant Martin and others, an agreement between them to do the unlawful things charged in the bill of indictment; and second, the jury must be satisfied beyond a reasonable doubt that either the defendant, or Martin, or some other person connected with the conspiracy, committed some act in the furtherance of the conspiracy in looking to its consummation. And so you must find, first, that there was an agreement between this defendant and at least one of the others charged in the bill of indictment, and, second, that something was done by one or more of them to carry out the agreement as charged in the bill, and you must find both facts beyond a reasonable doubt, from the testimony.

The Government contends that you should find from this testimony and beyond a reasonable doubt, that there was an agreement between the defendant, Funk, and the other conspirators alleged in the bill, and that beyond a reasonable doubt you should find that the defendant, Funk, himself, and other conspirators alleged in the bill performed not one overt act but a number of overt acts, committed for the purpose of carrying out, or in furtherance of, the conspiracy. In support of its contentions, the Government has offered you the testimony of a number of witnesses, beginning with the witness Martin, and the Government has sought to corroborate the witness Martin by the witness Vaughn and the witness Andrews, and a number of other witnesses, with regard to various transactions or overt acts by the defendant Funk in the furtherance of the conspiracy alleged. The Government calls attention to the facts of the intimacy as established by the evidence, as the Government contends between the defendant Funk and the coconspirator, Martin, call attention to the fact that there were any amount of telephone calls that went from the phone number of the defendant Funk, at his residence, to the residence and business phone and

other phones of Martin. The Government contends that most of these messages, if not all of them, were had by reason of the fact that the two conspirators, defendants Funk and Martin, were endeavoring to carry out the unlawful agreement charged in the bill. The Government calls attention to the fact that defendant Funk, on the witness stand, did not deny that he paid for those various calls, they having been charged to his residence telephone. The Government calls attention to the fact of the further evidence of the intimacy between these parties, that the witness Martin on one occasion made defendant Funk a present of an automobile and that there was a trade or an exchange of pistols. The Government calls attention to the fact of the visit to defendant's (Funk's) mother; in which the defendant took his wife, in Martin's automobile, Martin and his wife being present therein and drove a long distance to Harrisonburg, Virginia, where a visit was paid to Mrs. Funk, defendant Funk's mother; calls attention to the fact of the visit of the witness Martin to Roanoke, Virginia, accompanied by a man named Bowers and possibly others, and that there the witness Martin made contact with defendant Funk at Patrick Hotel, that they left Patrick Henry Hotel, and got in an automobile and drove to Roanoke Hotel, that defendant Funk went in an automobile and drove to Roanoke Hotel, that defendant Funk went in the Roanoke Hotel with witness Martin and remained there one half hour or more in conference. Government calls attention to the fact, that defendant Funk had a transaction with another person by the name of Fogleman who had been in trouble about liquor and was at the time a driver for the Government officers, and that he became indebted to this man Fogleman in the sum of $500.00, and gave his note or duplicate note here in the court room just before Fogleman went away to serve sentence, having made the note to Fogleman's wife, the Government arguing that this intimacy between Funk and these people should aid you in reaching a righteous conclusion in this case, and should lead your minds to the conclusion, and beyond a reasonable doubt, that the defendant was guilty of entering into the conspiracy alleged, and performed one or more overt acts in the furtherance thereof. The Government calls your attention to the evidence brought out by the transaction alleged to have taken place between Funk, defendant, and the witness Vaughn who met Funk in the town after some distribution of the passengers in the car, and the witness went to King Cotton Hotel and Martin told witness Vaughn he would have to pay $150.00 to pay Funk for protection. Witness said he had only $120.00, but Martin said he had the other $30.00; calls attention to the transaction down at Burlington or Graham, the Government alleging in furtherance of this conspiracy and as a part of his duty, defendant Funk called witness Martin over the telephone and said, "Don't take that load of liquor to Graham. The officers are going to make a raid and I have to go with them"; to the testimony of Martin that he made arrangements not to take the liquor to Graham but hid it at some place and drove on down without the liquor; that the defendant, Funk,

refused to enter a barn for the purpose of searching, that he had no authority to do it; calls attention to the evidence in the case offered by it, that subsequent to that the deputy sheriff of Alamance County wrote a letter to defendant Funk in which
41 he told him, "We got the man in the automobile who gave us the laugh last Wednesday night", calls attention to the fact that that letter found its way into the possesion of Martin the witness, who took it to the witness Andrews, and Andrews testified that he read it and kept it and had it, and that was the letter, and that thereafter the demand was made on him through Martin, to pay Funk a certain sum of money which the witness Andrews says he refused to pay. The Government calls attention to the fact that here was a transaction alleged to have taken place between Funk and other officers of the Government with regard to search and seizure on the premises and property of a man named Langley. As a result of that a quantity of beer was found, two cases, I believe; that Martin testified that Funk agreed to cover up that case and protect Langley, for $150.00; that he got the $150.00 and paid it to the defendant Funk, from Langley; that thereafter the defendant Funk, together with himself fixed up three phony bottles of beer, put some malt and meal and water in it and shook it up and sent it to the Government chemist at Charlotte, who returned an analysis of less than one half of one percent; the Government contending that that was a part of the scheme, overt act and in furtherance thereof on the part of the defendant Funk to protect Langley, for a consideration and price. The Government calls attention to the fact that subsequently a part of the Langley raid of beer was sent to the chemist at Charlotte, two bottles, and that analysis showed alcoholic content by volume, was in excess of 5%. The Government calls attention to the fact that it showed by the testimony, and asks that you should accept it, that the initial step in the furtherance of this conspiracy after it was entered into, was that defendant Funk agreed with the witness Martin to protect witness Martin's wife and wife's sister against a violation that the defendant Funk represented was made on the part of Mrs. Martin and her sister, Mrs. Craig, in that they had sold agent Dofflemeyer two pints of whiskey, or a pint of whiskey, and he could get it hushed up for $200.00; that he levied tribute on his wife's sister of $100.00, furnished $100.00 himself, and paid to Funk, and there was no prosecution. The Government calls attention to the testimony of Dofflemeyer, that he never made any contact with these two women, never purchased any whiskey from them. The Government arguing that this conspiracy was entered into for the purpose of ——— on one or more or all of these occasions to which I have directed your attention. The Government says that on that testimony, on that state of facts, that it is your duty to return a verdict of guilty; and I charge you, gentlemen of the jury, that if you believe from the testimony in this case, or upon all the testimony, that the defendant, Funk, entered into this alleged conspiracy with Martin, and you are further satisfied or convinced beyond a

reasonable doubt, on all the testimony that Funk after entering into the conspiracy, did one or more overt acts alleged, it is your duty to return a verdict of guilty; otherwise to return a verdict of not guilty.

Defendant Funks says that is what you should do, that you should return a verdict of not guilty, for that he is not guilty of the charges alleged against him, that he is not guilty of any conspiracy in the first place, and, in the second place, he committed no one of these acts that the Government has sought to establish as evidence of guilt. When you come to consider this case in the jury room, I charge you that it is your duty, first to fix in your minds that the defendant Funk is presumed in law to be innocent and that presumption of innocence began when the grand jury returned a true bill in this case, and it has continued from then until now and should
42 continue from now until you decide this case, ever present in your minds, unless from the testimony you are convinced beyond a reasonable doubt, that the defendant is guilty, in which event the presumption of innocence will be removed, and the presumption of guilt will obtain. Every citizen of this Republic charged with crime is presumed in law to be innocent until the contrary is shown beyond a reasonable doubt. Under the old English system the reverse was the rule. The Crown charged a subject with crime; the person or subject charged with crime was presumed to be guilty until he proved to the satisfaction of the jury that he was not guilty; but under our system, and I repeat it, the reverse is the rule. Every citizen of this country, white or black, rich or poor, male or female, charged with crime, is presumed in law not to have committed the crime, and the presumption stands until a jury is convinced by the testimony beyond a reasonable doubt that the person charged is guilty; then of course the presumption is removed.

The defendant denies the charge of criminal action on his part, and it stands denied until it is established by a verdict of a jury, based on the evidence and conviction on the evidence beyond a reasonable doubt that the defendant is guilty. Defendant Funk relies on the presumption of innocence and says you should ever be mindful of that, and I charge you, you should.

He further relies on the fact that he has shown a good character here in this case, by two or more witnesses, and could have shown a good character by a dozen or more, but for the fact that the Court ruled that two witnesses as to character was sufficient, provided the other witnesses as to character were tendered to the Government for cross examination, which was done in this case. I call your attention to the fact, gentlemen, that two or more witnesses, I think three, were permitted to testify as to the good character of the defendant, Funk. There were a number of other witnesses, among them very prominent citizens, which were tendered to the Government for cross examination as to the defendant, Funk's good character, and everyone of those witnesses, one after another, you will bear in mind, would have taken the witness stand and told you that

the defendant Funk is a man of good character, if the Court had permitted them to do it. So you have in the case evidence of good character of the defendant Funk by at least a dozen upstanding citizens of this and other communities. That is substantive evidence, and in itself may raise a reasonable doubt of the defendant's guilt, and if it does, the jury would be warranted, and in fact it would be the duty of the jury, if a reasonable doubt of the defendant's guilt was raised, to give the defendant the benefit of the doubt and return a verdict of not guilty. He contends that if you give him the benefit of that testimony of good character, coupled with the presumption of innocence which the law places about him, that would raise a reasonable doubt in your mind. If it does, then he is entitled to acquital, and you should so return your verdict. If it does not, then you pass on from the presumption of innocence and the good character evidence, and consider the other testimony in the case, and see whether anything else in the case in connection with the presumption of innocence and evidence of good character creates a reasonable doubt in your mind. Now, he hays you ought to acquit him because this evidence is not worthy of belief, he says the Government is entirely dependent upon the testimony of Charlie Martin, who is a self-confessed criminal, corroborated by a number of other self-confessed law violators. He says that if you take out of this case the testimony of Charlie Martin and the other law violators who have testified in corroboration of him, that you haven't enough left to justify you to convict him, under the rule laid down by the court. He contends, and I so charge you, that it is your duty
43 to accept with a degree of caution the testimony of the witness Martin. He is a self-confessed conspirator, although he is not charged in this bill of indictment, so when you come to pass upon the value or probity of his testimony, it is your duty to remember the character of the person who gave the testimony. But, after you have done that if you are satisfied that he spoke the truth, it is your duty to give his testimony the same weight and value as if he were the best man in the community. The defendant says you ought not to believe him, because he is not only a man of bad character but in addition to that he had a very strong motive to testify as he did. He points out and contends that the motive established here is: he would get immunity by reason of his testimony; that Martin understood from the beginning that if he became a witness for the Government and told all of this transaction that the Government would not prosecute him, and that is true, that is one reason he is not being prosecuted; the defendant contends that Martin traded his liberty in exchange for the testimony and that was the motive of a bad man to get a good man in trouble. Defendant contends that you ought not to accept the testimony of a man of the character of Martin, superinduced by the compelling or strong motive that he would escape trouble if he told, as he has, of this transaction with regard to the defendant Funk. In that connection it is my duty to say to you, notwithstanding the fact that a

witness may have been convicted of a crime, as in this case was Martin, he can tell the truth, and if he makes a statement on the witness stand which is corroborated and substantiated by evidence clear and convincing to a jury, then the jury would not be privileged to ignore such testimony simply because he was a former convict. The question is whether he told the truth and if you are satisfied beyond a reasonable doubt that the defendant is guilty, then return a verdict of guilty, otherwise, a verdict of not guilty. If the witness Martin did not tell the truth in this case, then defendant is entitled to a verdict of not guilty, and I so charge you.

The defendant points out to the jury and contends that you ought to consider the testimony of the witness Martin is not worthy of belief, because, the defendant contends, it is inconsistent. The defendant says that if he had agreed to give Martin and his associates the protection Martin said he agreed to give them, that Martin and his associates would be up here trying to protect him rather than destroy him, because, he contends and argues, that if these men were in the liquor business and the Government officers were giving them protection that these would be the last to complain about him.

He argues that Martin's associates being here and backing him by their testimony in this case in evidence, or a reasonable deduction from the evidence, to warrant the jury to see that their conduct clearly is inconsistent with their alleged agreement with defendant Funk. In other words, he contends that if they got what they said they did, protection from Funk, why should they be here complaining about it? He argues that they got none, and he entered into no conspiracy to give them protection, and the whole fabric of this charge is based upon Martin's effort to escape prosecution, and is his motive in this case, and that aMrtin had his associates, Vaughn, Andrews, and others, for the same motive come in and corroborate him. That is his contention, and his analysis of the testimony. He contends that their own self-interest would prompt them to continue with their alleged arrangement, and keep the protection rather than turn against him. The defendant further contends that this evi-
44 dence as to his intimacy with the witness Martin and these other people is a fact. He does not deny he was intimate with Martin. He admits it, and that he was in frequent contact with him, and that there were social relations between the families; but he contends that that is one of the methods in the line of his duty, being an undercover agent at one time, prohibition enforcement officer at another, various methods have to be resorted to, of ingratiating one's self into the good graces of suspects, leading them to believe they are making contact with a friend, in order to catch them violating the law. That is his explanation of this intimacy, and the fact that he did not know Martin was a violator of the law when he first made contact with him.

These are the contentions of the defendant. I have given you as far as I recall, his position in this case, his attitude towards the Government's testimony, his argument as to how you should analyze

it and accept it, in other words, his defense and answer to the testimony adduced in your hearing by the Government.

In addition he took the witness stand in his own behalf. I refer again to the old English system. There was a time when a subject of England charged with crime could not take the witness stand, upon the theory that a man would be tempted to commit perjury, therefore temptation should not be placed in his way, this was I think a very cruel rule; but under our system a defendant charged with crime may take the witness stand and under oath deny charges; and our rule is more humane still, if a defendant fails to take the witness stand, his failure to do so must not be construed by the jury as evidence of his guilt. That need not trouble us in this case. With the temptation to speak falsely before him in order to escape the charge, the jury is charged with the duty, and I call it to your attention, to weigh the testimony of the defendant with grains of allowance, with caution for the reason that he is the defendant and vitally interested in the outcome of your verdict; but after you have done that, gentlemen, if you think that the defendant spoke the truth as to all the material facts charged against him, as to all allegations laid against him, then it is your duty to give the defendant's testimony the same weight as if he were a disinterested witness. You heard what he said. You saw him on the stand, and his demeanor. He stated he never took a penny from any person throughout his career as revenue officer he performed his duties to the best of his ability, and so far as he was conscious he has not committed an unlawful act intentionally. Then he specifically denies the overt acts sought to be proved by the Government. He closed his case by offering evidence of good character by a number of witnesses.

Gentlemen of the jury that is the case of the defendant, and that is the case of the Government.

If there is any matter connected with the case that is not entirely clear in the mind of any juror, or any juror would like to ask the court for any information on any point in connection with the case, I shall be glad to have you do so, and I shall be glad to aid you and assist you in any way I can. If you become confused in any way, or become uncertain about the testimony, you are at liberty to advise the court.

On the question of what the testimony was, I omitted to tell you that you are the sole judges of that, what the counsel for the defendant said, what the counsel for the Government said is only proper for your consideration insofar as the statements of either tend to refresh your recollection and thereby give you a better grasp of what it was. But if your recollection is contrary to that of the district attorney or the attorneys for the defendant, or the court, follow your own recollections, because you are to find the facts in this case, and based upon the facts you return your verdict, and your verdict should reflect the truth.

It is an important case, important for the Government, and for society and the public, and important for the defendant, therefore you should not be influenced by any prejudice against this defendant

that you might possibly have or that might have been injected into this trial in your presence, nor should you be influenced by any esteem or compassion for the defendant and his family, because these matters are not for your consideration. Just simply in cold blooded, common-sense, and conscience, pass on this evidence, reach your conclusions and reflect the same in your verdict, of course, being mindful of the test the court has told you you must apply to the testimony and of the rule you must be guided by in that your verdict must be reached from the evidence.

In other words, gentlemen, the best rule I know to consider a case is laid down in the 15th verse of the 19th chapter of Leviticus: "Thou shalt do no unrighteousness in judgment. Thou shalt not honor the person of the mighty, nor respect the person of the poor, but in righteousness shallt thou judge thy neighbor."

It has been called to the attention of the court that the wife of defendant Funk was offered as a witness for him, and that she was denied the privilege of testifying. The defendant's counsel has asked me to explain that to the jury. In the Federal courts of this State the wife cannot voluntarily or involuntarily testify for or against her husband. When Mrs. Funk was tendered as a witness the Government objected and the court sustained the objection. So you need not give that any consideration whatever, because it has no bearing on the case. None of us know what she would have said and consequently whatever she knows about this case is not for the jury, and for the reason just stated.

Retire gentlemen and return your verdict.

To the foregoing charge there was no exception.

I. M. MEEKINS,
U.S. District Judge.

46 In United States District Court

Sentence

Whereupon the court sentenced the defendant, John S. Funk, to serve a term of one year and one day in the Federal penitentiary at Atlanta, Georgia; to the action of the court in rendering said judgment and sentence on the defendant, the said defendant, John S. Funk, excepts, and appeals in open court to the United States Circuit Court of Appeals for the Fourth Circuit. Defendant's exception *no.* #13.

In the United States Circuit Court of Appeals for the Fourth Circuit

UNITED STATES

vs.

JOHN S. FUNK AND A. S. (GUSS) DOWDY

[File endorsement omitted.]

Assignment of errors by defendant John S. Funk

(Filed April 12, 1933)

And now comes John S. Funk, appellant, and in connection with his appeal says that in the record, proceedings, and judgment aforesaid error has intervened to his prejudice, to wit:

1. The court erred in denying defendant's written motion to quash the bill of indictment in this cause as filed and set out in said record.

2. The court erred in denying defendant's motion for a bill of particulars.

3. The court erred in permitting May Craig, over the objection of Funk, to testify to alleged conversations, not in the presence or hearing of Funk, between the witness and C. C. Martin touching the sale of liquor to Dofflemeyer and the preparation to
47 bribe and the bribery of Funk, at Roanoke, Virginia, on or about September 28, 1928, and which antedates the formation of any alleged conspiracy and which was not in furtherence thereof.

4. The court erred in permitting the witness, Pete Buckner, to testify over the defendant's objection to the effect that, "He (Martin) told me (Buckner) he was going up there (Roanoke) to try to get a liquor case smothered out, the he was going to pay to Funk money to get him to smother it out," which conversation occurred prior to the trip to Roanoke or enroute thereto and not in the presence or hearing of the defendant, Funk, and which antedates the formation of the alleged conspiracy, and which was not in furtherence thereof.

5. The court erred in failing to withdraw the case from the jury, dismiss the action, and direct a verdict in favor of the defendant, upon the close of the testimony for the Government.

6. The court erred in refusing to permit Mrs. John S. Funk to testify as a witness in behalf of her husband, John S. Funk.

7. The court erred in refusing to permit Mrs. John S. Funk to testify under oath to the facts as she knew them of the alleged sundry visits of Martin and others to her home, and of her visit to his home, and with him and others to Harrisonburg, Virginia, and to contradict their statements, and to explain or tell who made the various telephone calls from her residence to Martin and others, charges for which appeared upon her husband's telephone bill, and were introduced by the Government as evidence against the defendant; and refused to let her explain or contradict various transactions
48 and conversations that witness Martin and other Government witnesses testified took place in her presence and with her and her husband.

8. The court erred in sustaining the objection of the United States district attorney and refusing to permit the defendant, John S. Funk, to explain and testify with respect to the trip to Martins-

ville, Virginia, with Guss Dowdy, and on which trip C. C. Martin accompanied them.

9. The court erred in sustaining the objection of the district attorney and in refusing to permit the defendant to testify with respect to certain charges for telephone calls appearing upon the bill of the telephone company, and introduced by the Government, and to show that some of these charges were made by his wife and not by the defendant.

10. The court erred in overruling motion of defendant, Funk, made at the close of all of the evidence to dismiss the prosecution for the reason that the proof was insufficient to sustain the allegations of the indictment; and that the evidence showed that if any conspiracy was formed it was formed in the State of Virginia; and in failing to direct a verdict of not guilty.

11. The court erred, after a verdict of guilty had been rendered and before judgment had been entered, in refusing to set aside the verdict of the jury and grant the defendant a new trial upon the ground that the verdict was contrary to the law and the evidence.

12. The court erred again after overruling defendant's motions aforesaid in refusing to sustain the motion of the defendant in arrest of judgment.

49 13. The court erred in rendering the judgment and sentence upon the said Funk as set out in said record.

GEO[illegible]E A. YOUNEE,
ALLEN ADAMS,
Greensboro, North Carolina.
CHAS. A. HAMMER,
Harrisonburg, Virginia.

In United States District Court

[Title omitted.]

[File endorsement omitted.]

Exceptions to bill of exceptions

(Filed April 14, 1933)

Now comes J. R. McCrary, United States attorney for the middle district of North Carolina, on behalf of the United States in this case, and files the following exceptions to the bill of exceptions of the appellant as served April 12, 1933.

Exception no. 1

On page fourteen of said bill of exceptions beginning at the period in line eleven, strike out all of the remainder of said paragraph and substitute therefor the following: Why I offered that check to Funk

instead of giving him the money, if I had the money in my pocket. I told him here it is. I said if you want it take it, you are right here at the bank. These people didn't know me. No, sir; the bankers didn't know me.

Exception no. 11

On page eighteen of the record, in line three, the following notation is made as to any objection by the defendant. Strike out
50 line three and insert in lieu thereof the following: "Defendant objects to fixing." Overruled for the present.

Exception No. 111

On page twenty-one of the bill of exceptions, in the first line after direct examination that which appears in parenthesis as follows: "Served time in Atlanta", that should be stricken out as it does not appear in the record, or in the stenographic transcript of the evidence; also strike out in said paragraph beginning in line four, the following, which appears in parenthesis, "Testified in former trial he was in the raid" for the reason that same does not appear in the record and in the stenographic transcript of the evidence, and is an insertion by counsel and not evidence.

Exception No. IV

In the third line next to the bottom of page twenty-five strike out December 1, 1928, and insert in lieu thereof December 18, 1928.

V

In line eight from the bottom, on page twenty-six, strike out the figures 145, and insert therein .45.

VI

On page thirty strike out the following: "Over the objection of the defendant Funk as aforesaid, the following questions and answers were permitted by the Court," and in explanation the following occurred:

Question by Mr. Carter. Direct examination of Pete Buckner.

Q. Did he state to you what his purpose of the trip to Roanoke was.

(Defendant objects. Objection overruled. Exception.)

Q. Did you accompany him to Roanoke?

A. Yes, sir.

Q. Did he tell you what he was going to Roanoke for?

A. Yes, sir.

Q. What was it?

A. He told me he was going up there to try to get a liquor case smothered out—said he was going to pay Funk money to get it smothered out.

Q. Did you go up there with him?

A. Yes, sir.

Q. Did you see Mr. Funk?

A. Yes, sir.

Q. Under what circumstances did you see him?

A. I saw him in an automobile.

Q. Whose automobile?

A. Mr. Martin's.

It will be observed that the defendant's objection was to the question: Did he state to you what his purpose for the trip to Roanoke was? No other objection appears, or was taken by the defendant to any other question or answer by the witness. Strike out all that appears on page thirty of said bill of exceptions beginning with the question "In line nine" and down to line sixteen, and substitute the questions and answers as above set forth.

VII

On page thirty-one of said bill of exceptions, in line four, after direct examination, beginning with "his" and ending with representations, strike same out and substitute the following: "His number was 3094-J." Witness exhibited certain telephone tickets. Yes, sir. These represent long distance telephone calls.

51

VIII

Strike out line eight from the bottom of bill of exceptions on page thirty-two, after the words "Mr. Carter" and insert in lieu thereof, "This was the only conversation I had with Funk while they were present."

IX

Strike out on page thirty-two, at the bottom of the page, all of same after the word, "Judge Meekins", and insert in lieu thereof the following: "As to why the officers were in my room I don't recall whether I met Trexler over there. There wasn't any arrangement that I would call up Funk. As to why they were in my room, I was to meet Mr. Trexler over there. I was to come over there and meet him, and as to why I come to meet him at that time, I had already told the fellow in Merrick's office about Funk."

X

Strike out the last line on page thirty-three after the words "Judge Meekins" and insert the following: "I took down what I heard. I could hear distinctly."

XI

Insert in the last line of paragraph on page thirty-five, being paragraph of direct examination by Mr. Carter, the following: "Showing letter to witness, the witness replied, I wrote the letter January 28th."

XII

Insert after the period in line ten, on page forty-seven, the following:

Q. Don't you know you arrested Gus in the prosecution of Jim Riddle, highjacker?

A. 165 gallons.

Q. Yes?

A. As the instigation of your office.

Q. You knew Gus was in the liquor business?

A. Yes, sir; certainly.

Q. Two years before that time?

A. Gus had the reputation of being in the liquor business. As to knowing it, I didn't know it."

XIII

On page forty-seven of said bill of exceptions, in line nineteen, after the word "Moore", insert the following: "Passing the buck to me."

XIV

Strike out on page sixty-two of said bill of exceptions, in line three at the bottom, after the word prosecution and down to the word jurisdiction, in the second line on page sixty-three of said bill of exceptions, for the reason that the defendant made a plain motion for a directed verdict, which appears in the record, and that no objection was made at any time during the trial as to the jurisdiction of the court.

The following exceptions are made to the defendant's assignment of errors:

52 First. Number one of said assignment of errors should be stricken out, as no motion to quash the bill of indictment was made.

Second. That the second assignment of error should be stricken out, as no motion was made as to a bill of particulars.

Third. That assignment number seven should be stricken out for the reason that the same is improper as stating that which does not appear in the record, as to what the witness would testify to.

Fourth. That assignment of error number eight is not tenable and not supported by the record as the defendant Funk testified as to his trip to Martinsville, with C. C. Martin, and the objection

by the Government, which was sustained, purely on the ground that counsel for the defendant had asked improper leading questions.

Fifth. That as to assignment of error number ten, the record does not support the said assignment in respect to a conspiracy being formed in Virginia, and questioning the jurisdiction of the Court.

Now, therefore, the United States attorney for and on behalf of the United States, submits the foregoing exceptions to the appellants bill of exceptions, and prays the Court that said bill of exceptions be corrected accordingly.

Respectfully submitted for the United States Attorney.

THOS. C. CARTER,
Asst. United States Attorney.

Service of the foregoing exceptions accepted.
Copy received this 14 day of April 1933.

ALLEN ADAMS,
Attorney for the defendant, Funk.

53 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Stipulation as to bill of exceptions

Filed April 21, 1933

It is stipulated and agreed by counsel for appellant and appellee that appellee's exceptions to the bill of exceptions numbers one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, and fourteen be, and the same are allowed and agreed to, and the clerk of the court will accordingly reform the bill of exceptions filed in this case in accordance with said exceptions of the appellee.

This the 21st day of April 1933.

ALLEN ADAMS,
Attorney for appellant.
THOS. C. CARTER,
Asst. United States Attorney.
Attorney for appellee.

Whereupon the said bill of exceptions were reformed and corrected in accordance with the provisions of the aforesaid stipulation, which said corrections and reformations were made before the said bill of exceptions were presented to the trial judge for his approval and signature; and said bill of exceptions as signed by the trial judge are in accordance with said stipulation.

54 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Notice of appeal

Filed March 15, 1933

To the United States of America or its attorney of record

You are hereby notified that the defendant, John S. Funk, appeals from action and judgment of the court in this cause to the Circuit Court of Appeals based upon assignment of errors herewith filed.

This 14th day of March 1933.

GEO. A. YOUNCE,
Attorney for defendant.
THOS. C. CARTER,
Asst. United States Attorney.

Service accepted and copy received this the 15th day of March 1933.

55. In United States District Court

[Title omitted.]
[File endorsement omitted.]

Petition for leave to prosecute without prepayment of costs

Filed Jan. 6, 1933

John S. Funk, the above named defendant, being duly sworn, says:

That he is a citizen of the United States of America, and that he was at the December Term 1932, in the United States District Court for the Middle District of North Carolina, at Greensboro, convicted therein of the crime of conspiracy, etc., and thereupon moved the court to set aside the verdict and arrest the judgment for errors to be assigned; when said motion was overruled and the defendant sentenced to the Atlanta Penitentiary for a term of 1 year and 1 day and from said judgment your affiant appealed to the Circuit Court of Appeals at Richmond, Virginia; that because of his extreme poverty he is unable to pay the costs of said appeal or writ of error, or to give security for the same, and that he verily believes that he is entitled to the redress he seeks by such appeal or writ of error, and that the appeal is taken and writ of error applied for in good faith, and therefore prays the court to grant him an order directing that he be allowed to prosecute said appeal without being required to prepay fees or costs, or for the transcribing, stenographic report and copy of same, and printing of the record in appellate court, or give surety therefor.

JOHN S. FUNK, *Affiant.*

Sworn to and subscribed before me this 21st day of December 1932.
[NOTARIAL SEAL] JOHN C. STRICKLAND, *N.P.*
My commission expires Jan. 26, 1924.

56 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Order granting petition

Filed Jan. 6, 1933

This cause coming on to be heard and being heard, and it appearing to the court that the defendant, John S. Funk, was heretofore convicted in this court of the crime of conspiracy, etc., and sentenced to the penitentiary at Atlanta, Georgia, for a term of 1 year and 1 day; and it further appearing to the court that the said John S. Funk has appealed to the Circuit Court of Appeals at Richmond, Virginia, from said judgment, and has asked for a writ of error in said cause; and it further appearing to the court that from the affidavit of the said John S. Funk he is unable to prepay the fees incident to his appeal or give security therefor on account of his extreme poverty, and that said appeal is taken in good faith.

It is, therefore, ordered, adjudged, and decreed by the court that the said John S. Funk be and he is hereby allowed to prosecute his appeal and sue out his writ of error in this cause to the Circuit Court of Appeal or any appellate court without prepaying the fees incident thereto for the transcribing, stenographic report and copy of same, and printing of the record, or for any costs for which he would be required to pay, or without giving security therefor.

I. M. MEEKINS,
United States District Judge.

57 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Order allowing appeal

Filed April 8, 1933

Upon the coming in of the jury and the rendering by the jury of a verdict of "guilty", December 16, 1932, the defendant, John S. Funk, moved to set aside the verdict of the jury and for a new trial and also made a motion in arrest of judgment.

Motion overruled. Defendant Funk excepts, and appeals in open court to the Circuit Court of Appeals for the Fourth Circuit.

Sentence imposed as set out in the record.

Defendant Funk excepts and appeals.

Notice of appeal, service of which was duly accepted, duly filed in the office of the clerk of the district court.

Said appeal be, and the same is hereby, allowed.

It is ordered that the defendant Funk have thirty days in which to serve and file bill of exceptions, and the Government ten days thereafter within which to file exceptions to said bill of exceptions. Jurisdiction of this cause is specifically held and retained by this court for the purpose of settling and allowing the bill of exceptions.

58 I. M. MEEKINS,
U.S. Judge.

Entered at Raleigh, March 16th, 1933.

In United States District Court

[Title omitted.]

Order extending time to perfect appeal

March 9, 1933

For good cause shown, it is ordered that the time for the defendant, John S. Funk, to perfect his appeal and same be filed in the Circuit Court of Appeals, Richmond, Va., be and the same is hereby extended thirty (30) days from March 16, 1933.

This 9th day of March 1933.

I. M. MEEKINS,
Judge, U.S. District Court.

59 Whereupon citation was signed by the aforesaid trial judge on the 28th day of April 1933 (service of which was duly accepted by the United States Attorney on the 1st day of May 1933), which said citation is in words and figures, as follows, to wit:

[Citation in usual form filed April 28, 1933, omitted in printing.]

60 In United States District Court

December 15, 1932

Minute entries of trial

[Title omitted]

Case is called for trial and the defendants appear. Upon motion of the district attorney it is ordered by the court that the defendants be arraigned. The defendants are arraigned at the bar and in their own proper persons enter the plea of not guilty, and of this they put themselves on their country and the United States through the district attorney doth likewise.

61 Thereupon it is ordered by the court that a jury of good and lawful men come by whom the truth of the matter may be better shown.

The following jurors, to wit: Ben Gibson, J. B. Roberson, T. H. Masten, Andrew Strader, A. H. Oakley, J. H. Woody, C. D. Oakley, T. E. Farrell, J. T. Wood, A. M. Deviney, J. P. Dalyrimple, A. F. Andrews, having heretofore been chosen, tried and sworn in in manner and form provided by law; are questioned and passed by the United States and the defendants, and are now duly impaneled to try this case.

Twenty-three (23) U.S. witnesses are called and sworn and testimony given.

The court charges the jury as to defendant Dowdy and directs them to return a verdict of not guilty as to this defendant.

Plaintiff rests.

Defendants moves for a directed verdict of not guilty as to defendant, Funk.

Motion denied. Defendant excepts. Arguments of counsel heard. The court charges the jury and directs them to return a verdict.

The jury in the above-entitled case now return from the jury room and being questioned by the clerk under directions of the court and in the presence of the defendant answer that they have agreed, and for their verdict say that the defendant, Funk, is guilty thereof in manner and form as charged in the bill of indictment.

62 The District attorney moves for and prays the judgment of the court. The defendant moves to set aside the verdict and for a new trial for the reason that said verdict is against the law and evidence, and for newly discovered evidence.

Motion denied. Defendant excepts. No. 13.

IN UNITED STATES DISTRICT COURT

Judgment

December 16, 1932

The defendant being present in court, it is ordered and adjudged that the defendant be placed in the custody of the Attorney General of the United States, to be assigned to such place as the Attorney General may designate, preferably the U.S. prison at Atlanta, Georgia, for a term of one year and one day.

The defendant in open court gives notice of appeal to the Circuit Court of Appeals.

Bond fixed at $2,500.00 (bond executed and approved and the defendant released from custody pending said appeal).

Memorandum Under Rule 14, Section 7

Notice of appeal dated March 14, 1933, and filed in clerk's office March 15, 1933.

Order allowing appeal dated March 16, 1933, and filed in clerk's office April 8, 1933.

Citation dated April 28, 1933, service accepted May 1st, 1933, and filed in clerk's office April 28, 1933.

Order allowing defendant to prosecute his appeal without prepaying costs or fees or giving surety dated January 6, 1933, and filed in clerk's office January 6, 1933. Petition praying for such an order dated December 21, 1932, and filed January 6, 1933, in clerk's office.

63 In United States District Court

[Title omitted.]

Stipulation as to Record

It is stipulated and agreed that the record in this case shall consist of this stipulation and the following:

1. The bill of indictment.
2. The bill of exceptions as signed by the trial judge.
3. Appellant's assignment of errors, and appellee's exceptions thereto.
4. Minutes of the court.
5. Orders extending time for serving, filing, and settling bill of exceptions, and for perfecting appeal, and all other orders signed by the trial judge in this cause.
6. Memorandum of clerk as to notice of appeal, citation, etc., in accordance with rule 14, section 7.
7. Clerk's certificate as to transcript of record.

It is also agreed that all documentary exhibits introduced on the trial of this cause and now in the possession of the clerk of the trial court shall be certified to the Circuit Court of Appeals by the clerk and shall be a part of this record.

This the 19th day of May 1933.

CHAS. A. HAMMER,
Harrisonburg, Va.
ALLEN ADAMS,
Greensboro, N.C.,
Attorneys for John S. Funk.

For the U.S. Attorney:
THOS. C. CARTER,
Asst. U.S. Attorney,
Middle District of North Carolina,
Attorney for the U.S.

64 In United States District Court

Order to Transmit Record

And thereupon it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States

Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

Teste: R. L. BLAYLOCK,
Clerk.

[SEAL]

By MYRTLE D. COBB,
Chief Deputy.

[Clerk's certificate to foregoing transcript omitted in printing.]

65 In United States Circuit Court of Appeals for the Fourth Circuit

No. 3517

JOHN S. FUNK, APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

APPEAL from the District Court of the United States for the Middle District of North Carolina, at Greensboro

Docket entries

May 24, 1933, the transcript of record is filed and the cause docketed.

Same day, original notice of appeal, order allowing appeal, citation, petition and order allowing appellant to prosecute appeal in forma pauperis are certified up.

Same day, the appearance of Allen Adams is entered for the appellant.

Same day, three typewritten copies of the transcript of record are filed.

May 26, 1933, the appearance of Thos. C. Carter, Assistant U.S. Attorney, is entered for the appellee.

Same day, the appearance of Chas. A. Hammer is entered for the appellant.

66 In United States Circuit Court of Appeals

Order allowing appellant to prosecute appeal in forma pauperis

Filed May 27, 1933

Upon the application of the appellant by Allen Adams, his counsel, and it appearing to the court that the appellant has filed in the district court an affidavit as to his poverty,

It is ordered that the appellant be, and he is hereby, allowed to prosecute his appeal in this court in forma pauperis, and that the case be heard on the original transcript of record.

May 27, 1933. JOHN J. PARKER,
Senior Circuit Judge.

June 1, 1933, the appearance of J. R. McCrary, U.S. attorney, is entered for appellee.

June 3, 1933, stipulation of attorneys as to the time for the filing of their respective briefs is filed.

In United States Circuit Court of Appeals

Motion of appellee to dismiss

Filed June 13, 1933

Now comes J. R. McCrary, United States Attorney, and attorney for the United States in this cause, and moves the court to dismiss the appeal as docketed for the following reasons:

67 I

That the court was without jurisdiction to allow an appeal in this case for the reason that the December term of United States District Court for the Middle District of North Carolina, held at Greensboro, North Carolina, at which time this cause was tried, was not extended by rule of the court, nor by special order of the court, for the purpose of this appeal; that said court adjourned sine die and no order was made in this case extending said term for the purpose of preparing and settling bill of exceptions, or perfecting said appeal, and therefore the court was without jurisdiction to allow the said appeal.

II

For the reason that supersedeas bond was allowed in the case before any assignment of errors was filed by the appellant, and no assignment of errors was filed at the time the appeal was allowed in the case by the trial judge, the said assignment of errors being filed after the filing of the bill of exceptions.

Wherefore, it is prayed the court that this appeal be dismissed under the rules of this court and the law made and provided.

This the 12th day of June 1933.

J. R. McCrary,
United States Attorney.
Thos. C. Carter,
Assistant U.S. Attorney.

68 June 14, 1933, original exhibits (documents) are certified up.

June 21, 1933, the appearance of Jno. W. Carter, Jr., is entered for the appellant.

June 22, 1933, the appearance of Allen Adams is entered for the appellant.

In United States Circuit Court of Appeals

Argument on motion of appellee to dismiss

June 22, 1933 (June term, 1933), cause came on to be heard on the motion of the appellee to dismiss the appeal before Parker, Northcott, and Soper, circuit judges, and is argued by counsel and submitted. Motion overruled in open court.

In United States Circuit Court of Appeals

Argument of causes on merits

June 22, 1933 (June term, 1933), cause came on to be heard on the merits before Parker, Northcott, and Soper, circuit judges, and is argued by counsel and submitted.

69 In United States Circuit Court of Appeals, Fourth Circuit

No. 3517

JOHN S. FUNK, APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Middle District of North Carolina, at Greensboro

(Argued June 22, 1933. Decided July 3, 1933)

Before PARKER, NORTHCOTT, and SOPER, Circuit Judges

John W. Carter, Jr., and Allen Adams (Chas. A. Hammer on brief) for appellant, and Thomas C. Carter, assistant U.S. attorney (J. R. McCrary, U.S. attorney, on brief) for appellee.

Opinion

FILED JULY 3, 1933

NORTHCOTT, Circuit Judge:

70 Appellant was convicted at the December term of the District Court of the United States for the Middle District of North Carolina, at Greensboro, on an indictment charging him with conspiracy to violate the National Prohibition Act and was sentenced to serve a term of one year and one day in the Federal penitentiary. Appellant was charged in the indictment with conspiring with one Charlie Martin, one Gus Dowdy and others, and was at the time of the alleged commission of the offense charged a Federal pro-

hibition agent. Martin was not indicted and was used as a witness against appellant, who will be here referred to as the defendant.

At a former trial the defendant and Dowdy were convicted and the case was appealed to this court (Funk v. United States, 46 Fed. (2) 417). In the last trial the Government did not ask a verdict against Dowdy and the case was dismissed as to him.

As will be seen from the former opinion of this court the judgment in the first trial was reversed as to Funk because the trial judge admitted certain evidence as corroborating Martin, the accomplice, which this court held was improperly admitted. On the second trial this evidence was not offered. Practically all the points raised on the present appeal were passed upon by this court in its former opinion with the exception of the question of variance between the allegations in the indictment and the testimony as given at the trial.

On the question of variance we are of the opinion that while the indictment contains many things not necessary to be alleged, it properly charges a conspiracy to violate the National Prohibition Act, and that while some parts of the conspiracy as alleged were not proven, the allegations of the indictment were sufficiently supported by the evidence to make the proof of the crime complete. The substantial rights of the defendant were not affected by the failure to prove all the acts charged in the trial (See, U.S. v. Weiss, 293 Fed. 992, cited with approval in Fort v. U.S., 273 U.S. 593; Manning v. U.S., 275 Fed. 29; Rudner v. U.S., 281 Fed 516). A contention as to variance that has more of technicality than substance will not be considered.

71

Bennett *v.* United States, 227 U.S. 333.

As was said by Judge Cochran, (in Funk *v.* United States, supra):

"We are not unmindful of the effect of sec. 269 of the Judicial Code, as amended by the act of February 26, 1919 (U.S. Code, title 28, sec. 321), whereby on the hearing of an appeal, we are required to give judgment after an examination of the entire record, without regard to technical errors or defects, which do not affect the substantial rights of the parties. This salutary legislation has been construed in a number of cases and frequently applied in this circuit.

"Workman *v.* U.S. (C.C.A. 4th), 43 Fed. (2) 44, 45.

"Clarksburg Trust Co. *v.* Commercial Ins. Co. (C.C.A. 4th), 40 Fed. (2) 626, 634.

"Chesapeake & Ohio Ry. Co. *v.* Cochran (C.C.A. 4th), 22 Fed. (2) 22, 26, and cases cited.

"Ohio Valley Bank *v.* Greenebaum Sons Bank & Trust Co. (C.C.A. 4th), 11 Fed. (2) 87, 91."

All other assignments of error that are of sufficient merit to warrant discussion were fully considered and, we think, properly passed on in the former decision. The testimony of the accomplice Martin was fully corroborated. There was ample evidence, aside from the testimony of the accomplice, to justify the verdict of the jury. The

charge of the trial judge was fair, to say the least, to the defendant, and there were no exceptions to it.

The judgment of the court below is accordingly affirmed.

72 In United States Circuit Court of Appeals, Fourth Circuit

No. 3517

JOHN S. FUNK, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

APPEAL from the District Court of the United States for the Middle District of North Carolina

Judgment

Filed and entered July 3, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

July 3, 1933. ELLIOTT NORTHCOTT,
U. S. Circuit Judge.

July 14, 1933, petition of appellant for a stay of the mandate is filed.

73 In United States Circuit Court of Appeals

Order staying mandate

Filed July 14, 1933

Upon the application of the appellant, by his attorney John W. Carter, Jr., Esq., and for good cause shown,

It is ordered that the mandate of this court in the above-entitled cause be, and the same is hereby, stayed pending the application of the appellant in the Supreme Court of the United States for a writ of certiorari, unless otherwise ordered by this court or the said Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date.

July 14, 1933. JOHN J. PARKER,
Senior Circuit Judge.

74 [Clerk's certificate to foregoing transcript omitted in printing.]

75 Supreme Court of the United States

Order allowing certiorari

Filed October 16, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, limited to the question as to what law is applicable to the determination of the competency of the wife of the petitioner as a witness. The case is advanced and assigned for argument on Monday, November 13 next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

76 (Endorsement on cover:) File no. 37,997. U.S. Circuit Court of Appeals, Fourth Circuit. Term no. 394. John S. Funk, petitioner, vs. the United States of America. Petition for writ of certiorari and exhibit thereto. Filed August 28, 1933. No. 394 O.T. 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 394

JOHN S. FUNK, PETITIONER AND APPELLANT BELOW,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This is a criminal prosecution brought in the District Court of the United States for the Middle District of North

Carolina by the respondent herein against John S. Funk, petitioner herein, by means of an indictment returned at Rockingham, N. C., at the September, 1929, term of said court which indictment charged the petitioner Funk along with others with the crime of conspiracy to violate the National Prohibition Act (R. 1).

The petitioner, a Federal Prohibition Agent, was charged along with one Gus Dowdy with conspiring with said Dowdy and one Charlie Martin to violate the National Prohibition Act (R. 2). The conspiracy is alleged to have been formed on or about July 5, 1928 (R. 2). The conspiracy is fully described, it being alleged that Dowdy and Martin should manufacture, transport, etc., intoxicating liquors and that Funk, in his capacity as an officer should aid and abet them by giving them information and protection against detection and arrest (R. 2-3).

The proof of the conspiracy comes almost entirely from the evidence of Charlie Martin (R. 9-12). That evidence fails to disclose any conspiracy in which Dowdy participated (R. 9-12). The conspiracy proved by Martin began after September 28, 1928 (R. 9). It did not involve any aiding and abetting by Funk of violations of the Federal Prohibition Law. It was confined to corrupt efforts to relieve offenders of prosecution after they had been caught (R. 9-12). In one case only did Funk give any advance information in an effort to protect Martin or others (R. 10-11). A motion to direct a verdict for the defendant was made at the conclusion of the Government's case (R. 29) and was renewed at the close of the case (R. 45). Proper exceptions were taken.

Prior to the formation of the conspiracy as proved Martin testified that he paid Funk $200 to suppress a prosecution against his wife and his wife's sister. This occurred at Roanoke, Virginia (R. 7-9). Over the petitioner's objec-

tion a witness Buckner, who went with Martin to Roanoke, was permitted to testify as to what Martin told him about the purpose of this trip, as follows: "He told me he was going up there to try to get a liquor case smothered out—said he was going to pay Funk money to get him to smother it out" (R. 25).

During the course of the trial Martin testified to acts and conversations in the presence of Mrs. Funk, wife of the defendant, and telephone conversations with her that were highly incriminating (R. 10, 12, 15, 16). At the close of the Government's case petitioner offered his wife as a witness. Upon objection by the Government she was not permitted to testify, nor was she permitted to state for the record what her testimony would be, and proper exceptions were taken by the defendant (R. 29).

The trial was by jury and a verdict (R. 45) and judgment was rendered in favor of the respondent, finding the petitioner Funk guilty and sentencing him to imprisonment for one year and one day in the Federal Pentitentiary at Atlanta, Georgia (R. 54, 64). An appeal from said judgment was taken by said petitioner to the United States Circuit Court of Appeals for the Fourth Circuit, which affirmed the judgment of the District Court (R. 70). The principal questions involved in said appeal were:

(*a*) Was the wife of the petitioner a competent witness in his behalf?

(*b*) Was the evidence of the witness Buckner introduced on behalf of the Government admissible as against the petitioner?

(*c*) Was there a fatal variance between the allegations of the indictment and the proof in the case in violation of the petitioner's rights under the 5th and 6th Amendments to the Constitution of the United States?

which questions were decided by the said United States Circuit Court of Appeals adverse to the contention of the petitioner and these decisions materially affected the determination of said appeal.

II.

Reasons Relied on for Allowance of the Writ.

1. The decision of said circuit court of appeals as to the competency of the petitioner's wife as a witness for him by holding that she was not competent, is in conflict with a decision of the Circuit Court of Appeals for the Ninth Circuit on the same matter in the case of *Rendleman* v. *United States* (1927), 18 Fed. (2d) 27; and is also in conflict with a decision of the Circuit Court of Appeals for the Ninth Circuit on the same matter in the case of *Green* v. *United States* (1927), 19 Fed. (2d) 850; and is also in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit on the same matter in the case of *Tinsley* v. *United States* (1930), 43 Fed. (2d) 891.

2. The decision of the said Circuit Court of Appeals as to the competency of the petitioner's wife as a witness for him by holding that she was not competent involves an important question of Federal law which has not been, but should be, settled by this Court.

3. The decision of the said Circuit Court of Appeals as to the competency of the petitioner's wife as a witness for him by holding that she was not competent is a decision of a Federal question probably in conflict with applicable decisions of this Court.

4. The great importance of certainty in the administration of justice by the inferior Federal courts, particularly with reference to the competency of a wife as a witness in behalf of her husband, when such husband is being tried

for a crime; the innumerable occasions upon which evidence of such a wife would be material and important in behalf of her husband if she be competent; and the need of an authoritative and elucidating decision on the question.

5. The decision of the said Circuit Court of Appeals as to the admissibility of the evidence of the witness Buckner by holding that it was admissible involves an important question of Federal law which has not been, but which should be, settled by this Court.

6. The decision of the said Circuit Court of Appeals as to the question of variance between the allegations of the indictment and the proof by holding that there was no material variance is an erroneous decision of an important question of general law.

7. The decision of the said Circuit Court of Appeals as to the question of variance between the allegations of the indictment and the proof by holding that there was no material variance involved an important question of Federal law which has not been, but which should be, settled by this Court.

8. The decision of the said Circuit Court of Appeals as to the question of variance between the allegations of the indictment and the proof by holding that there was no material variance is a decision of a Federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals had in the case numbered and entitled on its docket

"No. 3517, John S. Funk, appellant, *v.* United States of America, appellee," to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals be reversed by the Court and for such further relief as to this Court may seem proper.

Dated August 28th, 1933.

JOHN S. FUNK,
By CHAS. A. HAMMER,
JOHN W. CARTER,
ALLAN S. ADAMS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

No. 394

JOHN S. FUNK, PETITIONER AND APPELLANT BELOW,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT AND APPELLEE BELOW.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

The opinion in the United States Circuit Court of Appeals is reported in — Federal (2d) —.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is the 3rd day of July, 1933, as appears from page 70 of the record.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28, U. S. C. A., Section 347.

3. On a trial of an indictment charging the petitioner with conspiracy

(*a*) formed on or about July 5, 1928 (R. 2);
(*b*) with Martin and Dowdy (R. 2);
(*c*) to violate the National Prohibition Act (R. 2);
(*d*) by using his official position to aid and abet in the manufacture, transportation, etc., of intoxicating liquors (R. 2);

the government proved a conspiracy

(*a*) formed subsequent to September 28, 1928 (R. 9);
(*b*) with Martin only (R. 9-12);
(*c*) to corruptly influence prosecutions already begun (R. 9-12);
(*d*) and not to aid and abet in any positive violations of the National Prohibition Act as and when committed (R. 9-12).

But a motion to direct a verdict for the defendant was denied (R. 29, 45).

A witness Buckner was permitted to testify to statements of Martin made to Buckner prior to the formation of the conspiracy and not in pursuance thereof (R. 24-25).

The wife of the petitioner was held to be incompetent as a witness for him, although the Government had shown frequent instances of where she had knowledge of highly incriminating facts if the Government's evidence was true (R. 10, 12, 15, 16).

4. The cases believed to sustain said jurisdiction are as follows:

Magnum Import Co. v. *Coty*, 262 U. S. 159;
Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 508;
Keller v. *Adams-Campbell Co.*, 264 U. S. 314;

Layne & Bowler Corp. v. *Western Well Works*, 261 U. S. 387;

Webster Electric Co. v. *Splitdorf Electric Co.*, 264 U. S. 463.

III.

Statement of the Case.

This has already been stated in the preceding petition under I, which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The United States Circuit Court of Appeals erred in holding that the wife of the petitioner was an incompetent witness in his behalf.

2. The United States Circuit Court of Appeals erred in holding that the evidence of the witness Buckner was admissible as against the petitioner.

3. The United States Circuit Court of Appeals erred in holding that there was no fatal variance between the indictment and the proof.

V.

ARGUMENT.

Summary of the Argument.

Point A.—The wife of a defendant charged with crime in the Federal courts is a competent witness for her husband.

Point B.—1. Evidence of statements made by an alleged co-conspirator to a third party are not admissible unless made during the existence of the conspiracy and in furtherance of it.

2. Such evidence is not admissible for purposes of corroboration unless admitted for that purpose only and not as substantive and supporting testimony.

Point C.—If an indictment describes a conspiracy by naming the time of its formation, the parties thereto as well as the method by which it was to be effected, proof of a conspiracy formed at a different time, with different parties and for a different purpose will not support such an indictment. In such case there is a fatal variance between the allegations and proof and a failure to direct a verdict for the defendant upon proper motion is a denial of the defendant's constitutional rights under the 5th and 6th Amendments to the Constitution of the United States.

Point A.

The wife of a defendant charged with crime in the Federal courts is a competent witness for her husband.

This question is conceived to be the question of greatest importance in this case. It is of high moment because the many Federal district courts are from day to day trying many defendants whose interests are vitally affected by a proper decision of this interesting question. This is particularly true inasmuch as many of these inferior courts are assuming that the question has been definitely settled by decisions of this Court. So far as our research can determine there is not a single inferior Federal court whose decisions have been reported that has ever attempted to defend the rule that a wife is incompetent as a witness on behalf of her defendant husband by argument or reason. They all content themselves with relying upon the citation of several cases decided by this Court, sometimes adding that the matter is no longer one for discussion. In the light

of these decisions it is astonishing to learn that this Court has never discussed the reasons for such a rule nor supported it by any reasoning or substantial authority.

Cases In This Court.

The first case in which the Supreme Court ever approached the subject was that of *Graves* v. *United States* (Nov. 6, 1893), 150 U. S. 118, 121; 37 L. Ed. 1021; 14 S. C. R. 40. The wife was not offered as a witness. She was not present at the trial. During the course of the argument the District Attorney was permitted to comment upon her absence and to suggest that she ought to have been present, in order that witnesses for the Government might identify her as the woman seen with the defendant on certain occasions. In an opinion by Mr. Justice Brown this Court held that such argument was improper because the wife was not a competent witness either in behalf of or against her husband, and therefore there was no obligation or duty upon him to have her present. No authority is cited for the proposition that the wife would have been incompetent. No reason is given for such a rule.

In *Hendrix* v. *United States* (Jan. 3, 1911), 219 U. S. 79; 55 L. Ed. 102; 31 S. C. R. 193, this Court was for the first time confronted with the direct proposition of whether a wife was competent as a witness for her husband in a criminal prosecution for an offense against the United States. The case was tried in the Eastern District of Texas, which court excluded the evidence. The point is disposed of in the following language:

> "It is assigned as error that the wife of Hendrix was not allowed to testify in his behalf to certain matters which, it is contended, were 'vitally material to his defense.' The ruling was not error. *Logan* v. *United States*, 144 U. S. 263; 36 L. Ed. 429; 12 S. C. R. 617." Page 91.

There is not another word of discussion on the subject and no other authorities cited.

In *Jin Fuey Moy* v. *United States* (Dec. 6, 1920), 254 U. S. 189; 65 L. Ed. 214; 41 S. C. R. 98, the direct question came for the second and last time to this Court. The case had been tried in the Western District of Pennsylvania and the trial is reported in 253 Fed. 213. If that opinion is to be relied upon the question of the wife's competency as a witness for her husband was not there raised. In the resume of the argument for the petitioner appearing in Law Edition Reports (pp. 215-217) there is no reference to any contention that the wife was competent. The commentator in the Law Edition Reports (p. 214), after referring to the rule of *Hendrix* v. *United States, supra,* makes the following observation:

> "And it will be observed that this rule (that the wife is incompetent in behalf of her husband) is conceded in *Jin Fuey Moy* v. *United States, the actual decision being that the rule applies although her evidence is offered simply to contradict the testimony of particular witnesses for the government* who testified to certain matters as having happened in her presence."

We think it worth while to quote in its entirety that portion of the opinion which deals with the subject. This opinion was delivered by Mr. Justice Pitney, as follows:

> "But a single point remains—hardly requiring mention—the refusal to permit defendant's wife to testify in his behalf. It is conceded that she was not a competent witness for all purposes, a wife's evidence not having been admissible at the time of the first Judiciary Act (Sept. 24, 1789, 1 Stat. at L. 73, chap. 20), and the relaxation of the rule in this regard by 858, U. S. Rev. Stat., Comp. Stat. 1464, 9 Fed. Stat. Anno. 2d Ed. p. 1421, being confined to civil actions. *Logan* v. *United States,* 144 U. S. 263, 299-302, 36 L. Ed. 429, 441-443, 12 Sup. Ct. Rep. 617; *Hendrix* v. *United*

States, 219 U. S. 79, 91, 55 L. Ed. 102, 106, 31 Sup. Ct. Rep. 193. But, it is said, the general rule does not apply to exclude the wife's evidence in the present case, because she was offered not 'in behalf of her husband,' that is, not to prove his innocence, but simply to contradict the testimony of particular witnesses for the government who had testified to certain matters as having transpired in her presence. The distinction is without substance. The rule that excludes a wife from testifying for her husband is based upon her interest in the event, and applies irrespective of the kind of testimony she might give."

So far as we can determine no other case has been decided by this Court in which the direct point was in issue. The only authorities cited in any one of the three cases is that of *Logan* v. *United States, supra.*

We have not overlooked the fact that this Court has held that the wife is not a competent witness in a criminal prosecution in the Federal courts against her husband. *Miles* v. *United States* (April 4, 1881), 103 U. S. 304; 26 L. Ed. 481; *Bassett* v. *United States* (Dec. 22, 1890), 137 U. S. 496; 34 L. Ed. 762; 11 S. C. R. 165.

We are also advised that in civil cases the Court has held that a wife is not a competent witness for her husband. *Lucas* v. *Brooks* (Dec. 1, 1873), 18 Wall. 463; 21 L. Ed. 779. Nor is she a competent witness against the interest of her husband in such cases. *Stein* v. *Bowman* (1839), 13 Pet. 207; 10 L. Ed. 129; *Stickney* v. *Stickney* (May 3, 1889), 131 U. S. 227; 33 L. Ed. 136; 9 S. C. R. 677; *Hopkins* v. *Grimshaw* (Feb. 15, 1897), 165 U. S. 342; 41 L. Ed. 739; 17 S. C. R. 401. But as we see it these cases decide entirely different questions from that here presented and the decisions rest upon quite different reasons from any which may be urged in behalf of a rule that would make a wife incompetent for her husband in a criminal prosecution.

If the three cases, *Graves* v. *United States; Hendrix* v. *United States;* and *Jin Fuey Moy* v. *United States,* constitute the entire direct authority from this Court holding that a wife is incompetent for her husband in the present case, we submit that the reason for such a rule cannot be found within the reported cases which established it and that one must look beyond these decisions and particularly to *Logan* v. *United States, supra,* to ascertain the reasons controlling this Court in establishing a rule of evidence which, in the light of modern and enlightened thought, is repugnant to the principles governing the administration of justice in every one of the forty-eight States and in every English speaking jurisdiction in the world, except alone the Federal courts of this Government.

By an examination of the case of *Logan* v. *United States, supra,* we are able by inference at least to ascertain the probable source of the rule so imperfectly and scantily stated in *Hendrix* v. *United States, supra;* and *Jin Fuey Moy* v. *United States, supra.*

In 1851 *United States* v. *Reid,* 12 How. 361; 13 L. Ed. 1023, was decided by this Court. Reid and Clements were jointly indicted in the Circuit Court for the Eastern District of Virginia for murder. They were separately tried and upon Reid's trial he attempted to call Clements as a witness in his behalf. The court refused to permit him to do so, holding that as the witness was jointly indicted with the defendant he was not competent.

By a Virginia statute of 1849 the witness would have been competent. The contention of defendant was that Section 34 of the Judiciary Act of 1789 declaring, "That the laws of the several States * * * shall be regarded as rules of decision in trials at common law in the courts of the United States," made the Virginia statute applicable to the trial.

In an opinion by Mr. Chief Justice Taney, the Court held that the language of Section 34 applied only to civil cases at common law, saying in this connection:

> "But it could not be supposed, without very plain words to show it, that Congress intended to give to the States the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another. * * * Neither could the Court look altogether to the rules of the English common law, as it existed at the time of the settlement of this country * * * nor is there any Act of Congress prescribing in express words the rule by which the courts of the United States are to be governed, in the admission of testimony in criminal cases. But we think it may be found with sufficient certainty, not, indeed, in direct terms, but by necessary implication, in the Acts of 1789 and 1790, establishing the courts of the United States, and providing for the punishment of certain offenses. And the law by which, in the opinion of this Court, the admissibility of testimony in criminal cases must be determined, is the law of the State, as it was when the courts of the United States were established by the Judiciary Act of 1789." Page 363.

There follows considerable discussion of the purpose of the people of the United States to adopt the principles of the English common law. Attention is then directed to Section 20 of the Judiciary Act of 1789 and Section 29 of the Crimes Act of 1790 (it has been said that this latter section had been repealed in 1840. 43 Harvard Law Review, 556). These two sections refer to the matter of procedure in criminal and civil cases. The Court then adds:

> "But neither of these Acts make any express provision concerning the mode of conducting the trial after the jury are sworn. They do not prescribe any

rule by which it is to be conducted, nor the testimony by which the guilt or innocence of the party is to be determined. Yet, as the courts of the United States were then organized, and clothed with jurisdiction in criminal cases, it is obvious that some certain and established rule upon this subject was necessary to enable the courts to administer the criminal jurisprudence of the United States. And it is equally obvious that it must have been the intention of Congress to refer them to some known and established rule, which was supposed to be so familiar and well understood in the trial by jury that legislation upon the subject would be deemed superfluous. This is necessarily to be implied from what these Acts of Congress omit, as well as from what they contain.

"But this could not be the common law as it existed at the time of the emigration of the colonists, for the Constitution had carefully abrogated one of its most important provisions in relation to testimony which the accused might offer. It could not be the rule which at that time prevailed in England, for England was then a foreign country, and her laws foreign laws. And the only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress, was that which was then in force in the respective States, and which they were accustomed to see in daily and familiar practice in the State courts. And this view of the subject is confirmed by the provisions of the Act of 1789, which refers its courts and officers to the laws of the respective States for the qualifications of jurors, and the mode of selecting them. And as the courts of the United States were in these respects to be governed by the laws of the several States, it would seem necessarily to follow that the same principles were to prevail throughout the trial; and that they were to be governed in like manner, in the ulterior proceedings after the jury was sworn, where there was no law of Congress to the contrary." Pages 365-366.

The conclusion of the opinion is stated as follows:

> "But the rules of evidence in criminal cases, are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed. Congress may certainly change it whenever they think proper, within the limits prescribed by the Constitution. But no law of a state made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases; and the testimony of Clements was therefore properly rejected, and furnishes no ground for a new trial." Page 366.

We direct attention to the fact that nothing in the opinion suggests a variation from the rule of 1789 in States admitted to the Union after that date, although at the time of the decision there were a number of such States.

Forty years later *Logan* v. *United States* (April 4, 1892), 144 U. S. 263; 36 L. Ed. 429; 12 S. C. R. 617, came before this Court for decision. Logan along with other defendants was tried for conspiracy in the Circuit Court for the Northern District of Texas.

Martin and Spear were offered as witnesses by the Government. Martin had been convicted in the courts of North Carolina of a felony; Spear had been convicted in the courts of Texas of a felony, but Spear had been pardoned by the governor of Texas prior to the trial. There was objection by the defendants upon the ground that both witnesses were incompetent.

The plaintiff in error relied on a Texas statute of 1879 making felons incompetent as witnesses in that State.

An Act of Congress of the Republic of Texas in 1836 adopted the common law of England to be followed and practiced by the courts of the Republic of Texas and that act was in force when Texas was admitted to the Union in 1845.

Following the reasoning of *United States* v. *Reid, supra,* in an opinion by Mr. Justice Gray, the Court held:

> "The competency of witnesses in criminal trials in the courts of the United States held within the State of Texas is not governed by a statute of the state which was first enacted in 1858, but except so far as Congress has made specific provisions upon the subject, is governed by the common law, which, as has been seen, was the law of Texas before the passage of that statute and at the time of the admission of Texas into the Union as a state." Page 303.

Although the reasoning of the Reid case was approved and apparently followed, the Court avoided the result which at first blush would have been expected. It was becoming apparent that a rule which was regarded in 1851 as being sound was now coming to be looked upon as a medieval technicality and this Court, as well as the inferior Federal courts (as we shall presently show), began to find all sorts of reasons for permitting witnesses to testify rather than to hold them incompetent. It was held that the courts of North Carolina were courts of a foreign jurisdiction so far as the Federal courts of Texas were concerned and that conviction of felony in a foreign jurisdiction would not operate to prevent such a felon from testifying. Of course the State courts of Texas, in which Spear was convicted, were just as foreign to the jurisdiction of the Federal courts of Texas as were the State courts of North Carolina. But this was not referred to in the opinion. Spear was held competent because he had been pardoned by the Governor of Texas (who, of course, was the governor of a foreign State), and this removed his disqualification.

It is also true that this opinion, and particularly that part which we have quoted, has been taken as authority for the proposition that the common law of 1789 controls

in such matters only in the States which were a part of the United States as of 1789, and that as to States subsequently admitted the rule should be according to the common law of such State at the time of its admission to the Union. The language of the opinion does not directly sustain such a proposition, but it has now become more or less generally accepted by the respective circuit courts of appeal. *Withaup* v. *United States* (C. C. A., Eighth Circuit, Dec. 29, 1913), 127 Fed. 530; *McCoy* v. *United States* (C. C. A., Fifth Circuit, Jan. 12, 1918), 247 Fed. 861; *Louie Ding* v. *United States* (C. C. A., Ninth Circuit, Jan. 7, 1918), 247 Fed. 12. It has been suggested, however, that *Olmstead* v. *United States* (June 4, 1928), 277 U. S. 438, 466, 72 L. Ed. 944, 48 S. C. R. 564, has by inference shaken this rule and made the common law of 1789 applicable throughout the Union.

Benson v. *United States* (Dec. 5, 1892), 146 U. S. 325, 36 L. Ed. 991, 13 S. C. R. 60, next presented a like question to this Court. In a trial had in the District of Kansas the wife of the defendant testified against him. There was, however, no objection to her testimony and there was some question as to the timeliness of the motion to strike it out. For these reasons the Court held that there was no error in this respect. The importance of the case is for a different reason.

An accomplice jointly indicted with defendant, but not tried jointly (her case not having been disposed of at the time of defendant's trial), was examined as a witness for the Government. The Court first apparently discusses the question *in the light of the general common law* and seems to reach the conclusion that the sounder view is that at common law a co-defendant was competent for the Government, but not for the defendant. *There is not a particle of discussion as to the rule under the common law of Kansas at the time of its admission.*

The attention of the Court was directed to the fact that *United States* v. *Reid, supra,* had held that a co-defendant was not competent in behalf of his accomplice on trial. With reference to the Reid case the court, in an opinion by Mr. Justice Brewer, says:

> "It was assumed both in this court and in the circuit court (3 Hughes, 509, 539, 540) that by that law the co-defendant was incompetent. It was not affirmed that such was the rule in the mother country or in the other states of the Union. *We do not feel ourselves, therefore, precluded by that case from examining this question in the light of general authority and sound reason.*" Page 335.

Reference is made to the reasons for the common-law rule, to wit: 1st, that the witness was interested, and 2nd, that he was a party to the record. Fear of perjury was the reason for the rule. The Court comments as follows:

> "Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors. *But the last fifty years have wrought a great change in these respects, and today the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction.* • • • His competency being thus established, the limits of examination are those which apply to all other witnesses. Legislation of similar import prevails in most of the states. *The spirit of this legislation has controlled the decisions of the courts, and steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been*

removed, till now it is generally, though perhaps not universally, true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence.

"In the light of these authorities and this legislation of Congress, there is less difficulty in disposing of this question. *If interest and being party to the record do not exclude a defendant on trial from the witness stand, upon what reasoning can a co-defendant, not on trial, be adjudged incompetent?* The conviction or acquittal of the former does not determine the guilt or innocence of the latter, and the judgment for or against the former will be no evidence on the subsequent trial of the latter. Indeed, so far as actual legal interest is concerned, it is a matter of no moment to the latter. While the co-defendant not on trial is a party to the record, yet he is only technically so. Confessedly, if separately indicted, he would be a competent witness for the government; but a separate trial under a joint indictment makes in fact as independent a proceeding as a trial on a separate indictment. In view of this, very pertinent is the observation of Chief Justice Beasley, in *State* v. *Brien*, 32 N. J. L. 414: 'The only reason for the rejection of such a witness is, that his own accusation of crime is written on the same piece of paper, instead of on a different piece, with the charge against the culprit whose trial is in progress. It is obvious such a rule could only stand, in any system of rational law, on the basis of uniform precedent and ancient usage. I have discovered no such basis.' We think the testimony of Mrs. Rautzahn was competent, and there was no error in its admission." Pages 336-337.

Thus in 1892 this Court held that the Government might avail itself of the evidence of a co-defendant whose case was still pending. The essential reasons for such a holding, as we understand it, have been set out in the above quotation.

It would seem that if judicial construction can broaden the rules of evidence to the extent of making competent one charged with crime as a co-defendant; if it be important to enlarge the domain of competency and to break down the technical barriers which exclude such witnesses from the stand in such cases, then judicial construction can accomplish the same result as between husband and wife, and is it not equally as important and in the interest of justice and fair play for such authority to be exercised and such barriers removed in cases like the present one? However, nineteen years later when the case of *Hendrix* v. *United States, supra,* came before this Court, either such considerations were not presented to it, or else did not impress it.

On January 7, 1918, there came the decision in *Rosen & Pakkas* v. *United States,* 245 U. S. 467, 62 L. Ed. 406, 38 S. C. R. 148, in which this Court went a long step further than it had in *Benson* v. *United States.* Not content with making a co-defendant not yet convicted of crime a competent witness for the Government, the Court in this case completely destroyed the rule of incompetency as it applied to convicted felons.

We feel warranted in devoting considerable attention to the case. Both defendants were tried in the Eastern District of New York. Upon conviction their appeals were heard separately in the Circuit Court of Appeals for the Second Circuit. *Rosen* v. *United States* (Nov. 14, 1916), 237 F. 810, and *Pakkas* v. *United States* (Feb. 6, 1917), 240 F. 350. One Broder, who had been convicted of the crime of forgery in the courts of the State of New York, was offered as a witness for the government against both defendants. There was objection and the Circuit Court of Appeals passed on the question in both cases. In the Rosen case Circuit Judge Coxe does not attempt to justify the use of the witness by any sort of authority. In fact, the opinion says:

> "We are unable to find an authority exactly in point, but we think the decision in the court below was in accord with the trend of modern opinion." Pages 810–811.

There is no attempt to question the fact that conviction for forgery would have disqualified Broder under the common law as it existed in the State of New York in 1789. There is no attempt to rely upon the theory that the courts of New York State were those of a foreign jurisdiction and that therefore the witness would not be barred by such a conviction. The effort of the majority opinion seems to be to rely upon the fact that, although convicted of felony, Broder was sent to a reformatory rather than to the penitentiary. In other words, that the nature of the punishment inflicted was the test of competency rather than the nature of the crime. We venture to assert that no other decision has ever been based on similar reasoning. The majority opinion concludes with this paragraph:

> "The tendency of modern thought is towards the abolition of the archaic rules which undertook to declare, arbitrarily, who were and who were not entitled to credence as witnesses, and who should be absolutely debarred from taking the stand. All this is changed and now in most enlightened and progressive jurisdictions the tendency is to receive all the testimony bearing upon the issue, irrespective of the character of the witness who gives it. Proof of the commission of a crime discredits a witness but it does not absolutely exclude him from the witness stand." Page 811.

There is absolutely no discussion of the common law rule and its application in Federal courts.

In a dissenting opinion Ward, Chief Justice, insists that the witness Broder was incompetent and cited *United States* v. *Reid, supra,* and *Logan* v. *United States, supra,* as authority for his conclusion. In other words, he held to

the strict common law rule theretofore prevailing on the subject.

In the Pakkas case where the facts were the same there was a different opinion by Circuit Judge Rogers, from which we quote as follows:

> "On the trial of the case Broder, who had pleaded guilty to the offense charged in the indictment, was called as a witness by the prosecution. It appeared that he had been sentenced on January 28, 1914, for more than one year's imprisonment in the Elmira State Reformatory upon a conviction for burglary in the second degree. The record of that conviction was produced in open court and counsel for defendant objected to his testifying on the ground that he had been convicted of an infamous crime. The common law excluded the testimony of a person who had been convicted of such a crime; and as Congress has passed no act changing the rule of the common law as to the competency of witnesses in criminal cases in the courts of the United States except in special instances not including or material to the class of cases to which this belongs, it is urged that the admission of Broder's testimony was plainly error for which the conviction should be set aside. It is too late to raise that question in this court. We passed upon the question in *Rosen* v. *United States*, 237 Fed. 810, decided at this term. In its facts it is similar to this. In that case Judge Coxe said:
>
> " 'The tendency of modern thought is towards the abolition of the archaic rules which undertook to declare arbitrarily who were and who were not entitled to credence as witnesses and who should be absolutely debarred from taking the stand. All this is changed and now in most enlightened and progressive jurisdictions the tendency is to receive all the testimony bearing upon the issue irrespective of the character of the witness who gives it. Proof of the commission of a crime discredits a witness, but it does not absolutely exclude him from the witness stand.'

"To that decision we adhere. In *Brown* v. *United States*, 233 Fed. 353, the question came before the Circuit Court of Appeals in the Sixth Circuit, and that court held that as the federal courts are courts of an entirely different sovereignty and are wholly independent of the states, a conviction of an infamous crime in the state court rendering the person incompetent to testify in the state court does not render him incompetent to testify in the federal courts any more than it would in the courts of a foreign jurisdiction, for the federal courts while following the state laws do not give effect to a conviction by a state court. We are in full accord with that decision and hold that no error was committed in the admission of the testimony of Broder." Pages 354–355.

It will be observed that Judge Rogers conceded that Broder's conviction would have excluded him as a witness at common law. He relies upon the very unsatisfactory opinion of Coxe, C. J., in the Rosen case and upon the theory suggested in the Logan case by this Court, and definitely announced for the first time by the Circuit Court of Appeals for the Sixth Circuit, in *Brown* v. *United States* (May 12, 1916), 233 Fed. 353, that convictions in State courts were convictions in foreign jurisdictions and therefore did not act to make the convict incompetent even in Federal courts sitting in the State whose courts had convicted the felon.

When the case came on to this Court the briefs for the petitioners put great reliance on the dictrine announced in *United States* v. *Reid, supra,* and *Logan* v. *United States, supra.* In the brief filed by the Assistant Attorney General the rule laid down in those cases was attacked. It was stated that the difficulty in applying the rule suggested its unsoundness and that it had never been followed as to any other mode of procedure in criminal cases in the Federal courts after the jury is sworn (62 L. Ed. 407). The Government contended that:

"The matter should be re-examined, in the light of reason and public policy, and the rule in Benson's Case should be adopted; namely, that *all witnesses are competent unless some clear reason of public policy forbids*" (62 L. Ed. 408).

The court said in an opinion by Mr. Justice Clark:

"In the almost twenty years which have elapsed since the decision of the Benson case, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent; with the result that this principal has come to be widely, almost universally, accepted in this country and in Great Britain.

"Since the decision in the Benson case we have significant evidence of the trend of congressional opinion upon this subject in the removal of the disability of witnesses convicted of perjury (Rev. Stat. 5392, Comp. Stat. 1916, 10295, by the enactment of the Federal Criminal Code of 1909 (35 Stat. at L. 1088 321; Comp. Stat. 1916 10165, with this provision omitted and 5392 repealed. This is significant, becaues the disability to testify, of persons convicted of perjury, survived in some jurisdictions much longer than many of the other common-law disabilities, for the reason that the offense concerns direetly the giving of testimony in a court of justice, and conviction of it was accepted as showing a greater disregard for the truth than it was thought should be applied from a conviction of other crime.

"Satisfied as we are that the legislation and the very great weight of judicial authority which have developed

> in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved."

It is, of course, quite apparent that this Court was unwilling to adopt the reasoning of either opinion of the circuit court of appeals. Manifestly it could not approve Judge Coxe's idea that the nature of the punishment rather than the nature of the offense should determine competency or incompetency. It was also unwilling to resort to such hair-splitting technicalities as were involved in a decision to the effect that a witness who had been convicted of infamous crime in the State courts of New York should be competent to testify in a criminal trial in the Federal courts (sitting perhaps in the very city in which the conviction was had), but that another witness convicted of the very same crime in a Federal court (sitting in such a city) should be incompetent to testify as a witness in a Federal prosecution. Evidently this Court could not believe that the ends of justice would be served by such a rule and was unwilling to rest its decision upon any such reason. It, therefore, tore the old common-law rule up by the roots insofar as the competency of a convicted felon was concerned, and in no court in the United States has it ever been since sugested that such a rule now applies.

An examination of the opinion in the Rosen case shows clearly the unwillingness of this Court to be bound hard and fast by the holding of the Reid case and its purpose to follow the Benson case and to determine the question presented in the light of general authority and of sound reason. The opinion seems to approve of the idea that changes may be made in the rules of evidence in Federal

courts by judicial construction as well as by legislation. Reference is had to the universal tendency in this country and in Great Britain to hear the testimony of persons of competent understanding who have knowledge of the facts, leaving the credit and weight of such testimony to be determined by the jury rather than by rejecting witness as incompetent. The court definitely and positively approved of this tendency and says that it proceeds upon sound principle. It is difficult for us to undertsand, if the tendency is sound, why it should be applied to make a convict competent and yet not to be applied to permit husband or wife to testify for each other. Is a convicted felon more likely to tell the truth than a man or woman of good character whose sole fault is that they happen to be the husband or wife of a person charged with a crime? If the dead hand of the common law is no longer to act as a bar to a convict, why should it so act as to a husband or wife? If the Federal courts may, without the aid of congressional legislation, permit a convict to testify, notwithstanding the fact that he was incompetent under the common law rule of 1789, why should not these same courts have the power to do likewise in a case of husband or wife? Congress has made a convicted perjurer a competent witness in Federal courts. Under such circumstances will this Court hold a wife to be incompetent solely because more than eighty years ago in the Reid case the court read into an Act of Congress something admittedly not expressly stated therein and thereby established a precedent, the effect of which is now seen to promote injustice rather than justice.

As has been said by one commentator:

> "The Reid case had anchored the federal criminal courts to antiquity. By 1918, this impediment to otherwise universal progress has become insupportable. Congress showed no sign of being helpful, so the Court resorted to self-help. Prior to the Rosen case the law

had had a high degree of certainty and predictability; but in the trite phrase, it was the certainty of injustice." 43 Harvard Law Review 563.

It may be of interest to point out the view taken of the Rosen case by some of the inferior Federal courts, in cases which are not in point so far as facts are concerned.

In the First Circuit the Circuit Court of Appeals in the case of *Solomon* v. *United States,* 297 F. 82 (Feb. 26, 1924), the tendency to "enlarge the domain of competency" seems to meet with approval, and in *Scaffidi* v. *United States* (Jan. 21, 1930), 37 Fed. (2d) 203, attention is called to the fact that the Reid case has been modified by the Rosen case with the following comment:

> "*By judicial construction* the Rosen case removes the bar which prevented a person previously convicted of a felony from testifying in a criminal action." Page 208.

In the Eighth Circuit in the case of *Neal* v. *United States* (July 14, 1924), 1 Fed. (2d) 637, the court says:

> "It may be under the doctrine of *Rosen* v. *United States* (Citation), that the rules of evidence which prevailed in Oklahoma territory at the time of the admission of Oklahoma into the Union are not to be inflexibly applied in the federal courts of that district, but are *subject to modification from time to time as the trend of judicial authority* and legislative enactment require." Page 639.

In the same circuit court in *Williams* v. *United States* (Nov. 22, 1924) 3 Fed. (2d) 129, attention is directed to the fact that almost universally there has been the removal of the disqualification of witnesses convicted of crimes and upon the authority of the Rosen case it is stated that the disqualification does not exist in the Federal courts.

In the Ninth Circuit in *Fay* v. *United States* (Dec. 5, 1927), 22 Fed. (2d) 740, the Rosen case is cited as authority for the proposition that the common law of England with reference to rules of evidence is not controlling.

In the Tenth Circuit in *Coulston* v. *United States* (June 29, 1931), 51 Fed. (2d) 178, the following statement is made upon the authority of the Rosen case:

> "In criminal cases the competency of witnesses is determined by the common law of the jurisdiction as it existed when the state was admitted into the Union, *subject to such changes as may be brought about by judicial authority* or congressional enactment." Page 181.

In the case of *Great Falls Gas Company* v. *Public Service* Commission (Feb. 4, 1930), 39 Fed. (2d) 176, the District Court of Montana says:

> "Judicial legislation may be inescapable. All courts indulge it not alone by reading into statutes what legislatures did not include, but also by new judges expressly or impliedly reversing old and different attributes as aforesaid, removing ancient landmarks by the latter erected.
>
> "Interesting and instructive illustrations may be cited from even the Supreme Court Reports, sometime by 6-3 or 5-4 decisions. Amongst others is the Rosen case (Citation) reversing the cases and repealing the law of more than one hundred years to legislate competency as witnesses in behalf of convicts though curiously enough the like was refused to husband and wife in Jin Fuey Moy (Citation)." Page 178.

A stickler for hard and fast adherence to precedent might criticise the decision in the Rosen case upon the theory that a substantial and radical change was made in the law by "judicial authority and construction", rather than legislative action as is pointed out in some of the

cases just cited. If true this is not an insuperable objection to the case as authority. Manifestly the Rosen case, along with others, was in the mind of Mr. Justice Brandeis when in a dissenting opinion in *Burnett* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 76 L. Ed. 815, 52 S. C. R. 443, he said:

> "*Stare decisis* is not, like the rule of *res judicata*, a universal, inexorable command. 'The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.' *Hertz* v. *Woodman*, 218 U. S. 205, 212, 54 L. Ed. 1001, 1005, 30 S. C. 621." — 406.

A footnote is added listing a great number of cases in which this Court has overruled its earlier decisions and there is included *Rosen* v. *United States* overruling *United States* v. *Reid*.

Twenty-one days after the Rosen decision this Court decided *Greer* v. *United States* (Jan. 28, 1918), 245 U. S. 559, 62 L. Ed. 469, 38 S. C. R. 209. This case was tried in the Eastern District of Oklahoma and then in the Circuit Court of Appeals for the Eighth Circuit. The question involved was the failure of the court to instruct the jury that the defendant was presumed to be a person of good character. The only matter of interest is found in the opinion by Mr. Justice Holmes, as follows:

> "It is argued that the court was bound by the rules of evidence as they stood in 1789. That those rules would not be conclusive is sufficiently shown by *Rosen* v. *United States, supra*. But it is safe to believe that the supposed presumption is of later date of American origin and comes from overlooking the distinction between this and the presumption of innocence, and from other causes not necessary to detail." Page 561.

The case is cited as showing that *Rosen* v. *United States* has been approved by this Court. However, in passing it might be of interest to point out that it is now generally taken that the rule in Federal courts sitting in Oklahoma would not be that of 1789, but would be the rule there prevailing at the time of Oklahoma's admission to the Union (*Neal* v. *United States*) (C. C. A., Eighth Circuit, July 14, 1924), 1 Fed. (2d) 637. Therefore, it would seem to be of small consequence whether the rule criticised by Mr. Justice Holmes is of later date or of American orgin, unless the Rosen case destroys not only the Rule of 1789 but the rules of local law in States subsequently admitted.

CASES IN THE INFERIOR COURTS.

It is perhaps of some value to refer to the decisions in the inferior Federal courts that touch upon the general rules announced in *Reid* v. *United States, Logan* v. *United States, Benson* v. *United States, Hendrix* v. *United States, Rosen* v. *United States,* and *Jin Fuey Moy* v. *United States.* We refer first to those cases that deal with the competency of convicts.

CONVICTS.

In *Maxey* v. *United States* (C. C. A., Eighth Circuit, July 23, 1913), 207 F. 327, it was held that a witness offered for the Government was incompetent because he had been convicted and sentenced for a felony. The record is not clear as to whether this conviction was in a Federal or a State court, as it stated merely that he was sentenced to "15 months in the penitentiary at Atlanta, Georgia." Assuming, however, that he was convicted in the Federal courts the decision is in line with the doctrine of *United States* v. *Reid, supra,* and *Logan v. United States, supra.* This is the only case that we have been able to find which holds that a witness offered for the Government is incompetent because of a

former conviction of crime. In the other cases decided prior to the Rosen case the courts do not expressly repudiate the rule of *Reid* v. *United States* and *Logan* v. *United States,* but they are ingenious in finding some reason why the rule should not apply.

In *United States* v. *Hall* (W. D. of Pa., Dec. 17, 1892), 53 Fed. 352, the rule of incompetency is approved, but the witness was permitted to testify for the Government because of subsequent pardon.

In *United States* v. *Hughes* (W. D. of Pa., Dec. 17, 1892), 175 Fed. 238, there was a like state of facts and a like finding.

In *United States* v. *Sims,* (N. D. of Ala., Dec. 23, 1907), 161 Fed. 1008, the Government offered a witness who had been convicted in that same court for embezzlement of funds of a national bank and had been sentenced to the Federal penitentiary. The court quotes from *Benson* v. *United States, supra,* as to the modern tendency to enlarge the domain of competency and refers to "This broadening of the lines of judicial construction upon the competency of a witness has been wrought in this country partly by legislation and *partly by judicial construction.*" Page 1011. The witness was held competent because embezzlement was not a crime at common law.

In *Brown* v. *United States* (May 12, 1916), 233 Fed. 353, the Circuit Court of Appeals for the Sixth Circuit had under consideration a case tried in the Middle District of Tennessee. A witness offered for the Government had been convicted of a felony in the State courts of Tennessee and sentenced to five years in the State penitentiary. The order of his conviction concluded as follows:

> "That he be rendered infamous, incompetent as a witness in any court of justice in the state, incapable

of exercising the election franchise, or of holding any office of honor, profit or trust in the state." Page 354.

Under the common law as it prevailed in Tennessee in 1789 the witness would have been incompetent in the courts of that State. Notwithstanding this state of facts the Court sought to avoid the application of the archaic common-law rule of 1789 and succeeded in so doing. It pointed out that the tendency to enlarge the domain of competency was wrought partially by legislation and *partially by judicial construction.* It stated that "steadily one by one mere technical barriers which excluded witnesses from the stand have been removed," and announced its judgment as follows:

> "We conclude that the rule of the Reid case, announced by Chief Justice Taney, applies only to an instance where the witness tendered is under the conviction of a crime *against the United States* of that character, which at common law, as established in 1789, rendered infamous the adjudged guilty, and that the rule does not disqualify a witness who is under but the judgment of a state court." Page 359.

This is the case relied upon by Circuit Judge Rogers in his opinion in the Pakkas case, *supra*, which, as we have pointed out, this Court was unwilling to follow and approve.

In *McCoy* v. *United States* (Jan. 12, 1918, 247 Fed. 861, the Circuit Court of Appeals for the Fifth Circuit had under consideration a conviction in the Southern District of Florida. A witness for the Government had been convicted of a felony in Arkansas. Construing the Reid case and the Logan case, the court says:

> "We thus deduce the rule as expounded in this case (Logan case) and in the Reid case to be that, in the absence of specific legislation by Congress, the rules of evidence in the courts of the United States affecting the competency of witnesses in criminal trials, is the law of the state in which the trial occurs as it existed

when that state became a part of the Union." Page 863.

Inasmuch as the law of Florida at the time of its admission to the Union made competent a person who had been convicted of a crime in a jurisdiction other than that of the State of Florida, the witness was here held to be competent.

While this case was decided five days after the Rosen case, evidently the opinion in the Rosen case was not available to the court and is not relied upon in the majority opinion. There is a dissenting opinion by Circuit Judge Batts, which very strongly attacks the theory that the rule of the Reid case is modified in States admitted to the Union since 1789, by accepting the rule prevailing in such States at the time of their admission. Judge Batts would apply the rule of 1789 as it obtained in the original States to all States of the Union, regardless of when admitted. He argues that any other rule would result in hopeless confusion and diversity of opinion on the point. The other cases on the point are all subsequent to the Rosen case and follow that case without criticism or discussion. They are as follows:

Second Circuit—*Safford* v. *United States* (May 10, 1918), 252 Fed. 471;

Fifth Circuit—*Chapman* v. *United States* (Dec. 25, 1925), 10 Fed. (2d) 124;

Sixth Circuit—*Fisk* v. *United States* (Mch. 17, 1922), 279 Fed. 12;

Seventh Circuit—*Peace* v. *United States* (Dec. 14, 1921), 278 Fed. 180;

Eighth Circuit—*Manuel* v. *United States* (Oct. 14, 1918), 254 Fed. 272;

Eighth Circuit—*Ammerman* v. *United States* (Aug. 23, 1920), 267 Fed. 136;

Eighth Circuit—*Hurwitz* v. *United States* (May 12, 1924), 299 Fed. 449;
Eighth Circuit—*McCormick* v. *United States* (Nov. 13, 1925), 9 Fed. (2d) 237;
Eighth Circuit—*Hagan* v. *United States* (Nov. 28, 1925), 9 Fed. (2d) 562.

We summarize the doctrine of the incompetency of a convict in a Federal criminal trial and its development or rather its deterioration as reflected by the decisions. A convict is incompetent because incompetent under the common law of 1789 (Reid case and Maxey case), but in States admitted since 1789 he is competent if he was competent under the local law of such State when admitted (McCoy case and Withoup case). However, if the conviction be had in a State other than the one in which the Federal court is sitting, such conviction does not make him incompetent (Logan case and McCoy case). Upon further reflection a conviction in the courts of the very State in which the Federal court is sitting does not make him incompetent. The conviction must be in a Federal court for a crime against the United States (Brown case and Pakkas case) and then the convict is only in competent if the conviction was for a crime that the law took cognizance of as making him incompetent 150 years ago (Sims case). Finally the convict is competent in any event (Rosen and Pakkas case).

CO-DEFENDANTS.

On the question of the competency of a co-defendant as a witness for the Government against the defendant on trial, the case of *Wolfson* v. *United States* (C. C. A. Fifth Circuit, April 10, 1900), 101 Fed. 430, holds that the co-defendant was competent. In this case the two defendants, Wolfson and Leefe, were jointly tried. Before the close

of the Government's evidence counsel for Leefe offered him as a witness and he was permitted to testify over Wolfson's objection. Of course, insofar as the common law doctrine of co-defendants is concerned neither *Reid* v. *United States* nor *Benson* v. *United States* authorize such a holding. The court concluded that under the common law rule the witness would have been incompetent. It could not draw the distinction that had been drawn in the Benson case between a co-defendant offered for the Government and one offered for the defendant, because in the case at bar there was a joint trial and the witness was interested in the outcome of the very trial then being had, which was not true in the Benson case. However, the court permitted Leefe to testify on the theory that an act of Congress making a defendant competent as a witness at his request changed the common-law rule. The following comment on the common-law rule is interesting:

> "This statement of the common law is useful as showing the barriers to getting at the facts of a case which modern statutes were intended to remove. Of the wisdom or the want of wisdom of these common law rules we have nothing to say. They have been commended as preventing perjury and securing justice and condemned as stopping the mouths of those who are often the only persons that know the facts of the case. *The trend of the present day is to enlarge and not contract the sources of evidence.*" Page 435.

Husband and Wife.

Cases decided by the inferior Federal courts on the question of the competency of husband and wife are now referred to.

That a wife is not competent to testify against her husband generally is held in the following cases:

United States v. *Jones* (D. of S. C., Oct. 1887), 32 Fed. 569;

United States v. *Gwynne* (E. D. of Pa., Jan. 6, 1914), 209 Fed. 993;

Johnson v. *United States* (C. C. A. Eighth Cir., Mch. 2, 1915), 221 Fed. 250;

Cahan v. *Carr* (C. C. A. Ninth Cir., Feb. 24, 1931), 47 Fed. (2d) 604.

That a wife is competent to testify against her husband in certain cases involving exceptions to the common-law rule, particularly in the case of an offense against her person is shown by the following cases:

United States v. *Rispoli* (E. D. of Pa., June 14, 1911), 189 Fed. 271;

Fifth Circuit—*Denning* v. *United States* (Jan. 14, 1918), 247 Fed. 463;

Ninth Circuit—*Cohen* v. *United States* (May 4, 1914), 214 Fed. 23;

Ninth Circuit—*Pappas* v. *United States* (May 7, 1917), 241 Fed. 665;

Ninth Circuit—*Parker* v. *United States* (Feb. 2, 1925), 3 Fed. (2d) 903;

Ninth Circuit—*Kerr* v. *United States* (Feb. 23, 1926), 11 Fed. (2d) 227.

Wives of co-defendants who have already pleaded guilty are held to be competent as witnesses against the defendants then on trial.

Third Circuit—*Knoell* v. *United States* (Feb. 2, 1917), 239 Fed. 16;

Eighth Circuit—*Astwood* v. *United States* (June 20, 1924), 1 Fed. (2d) 639;

Tenth Circuit—*Parnell and Hays* v. *United States* (Apr. 10, 1933), 64 Fed. (2d) 324.

In one case, *O'Brien* v. *United States* (C. C. A. Eighth Circuit, June 2, 1924, 299 Fed. 568, the court held that the

wife of one defendant was competent to testify in behalf of the other provided her evidence was not in behalf of her husband but in support of a separate defense made by his co-defendant. However, the decision was that there was no error in the case in refusing to permit her to testify because her testimony did not come within the rule stated, but was solely in behalf of her husband. None of these cases, however, seem to us to be in point on the question here involved.

Before the decision of *Jin Fuey Moy* v. *United States, supra,* the Circuit Court of Appeals for the Fifth Circuit held in the case of *Talbott* v. *United States* (Oct. 6, 1913), 208 Fed. 144, that:

> "Under the common law the wife of one co-defendant on trial at the same time cannot be called as a witness for or against any of them." Page 145.

The statement is unsupported by argument or reason, and the only authorities cited are *Lucas* v. *Brooks, supra,* and *Bassett* v. *United States, supra.* No reliance is had on either *Graves* v. *United States, supra,* or *Hendrix* v. *United States, supra.*

Since the decision of Jin Fuey Moy it has been held that a wife is incompetent as a witness to testify on behalf of the co-defendants of her husband, certainly where her testimony is in defense of her husband as well as the co-defendants.

United States v. *Davidson* (E. D. of Pa., Dec. 29, 1922), 285 Fed. 661;

United States v. *Liddy* (E. D. of Pa., Oct. 17, 1924), 2 Fed. (2d) 60;

Sixth Circuit—*Haddad* v. *United States* (Dec. 4, 1923), 294 Fed. 536;

Sixth Circuit—*Israel* v. *United States* (Mch. 3, 1925), 3 Fed. (2d) 743;

Seventh Circuit—*Allen* v. *United States* (Oct. 7, 1924), 4 Fed. (2d) 688.

Most of these cases seem to rely upon the authority of *Jin Fuey Moy* v. *United States*. In none of the cases decided since Jin Fuey Moy is there the slightest effort made to reconcile that case with the case of *Rosen* v. *United States*. In none of them is there any effort made to discuss the common law applicable to the situation either in 1789 or at the time of the admission of any of the respective States. Apparently some of these courts construed Jin Fuey Moy to make a wife incompetent generally in behalf of her husband in Federal courts without reference to what the common law or local rule was.

We come now to decisions of inferior Federal courts holding that a wife is incompetent to testify for her husband in a criminal case. The only one we are able to locate prior to the decision in *Rosen* v. *United States, supra,* is the case of *Wesoky* v. *United States* (C. C. A., Third Circuit, Jan. 11, 1910), 175 Fed. 333. The case was originally tried in the Western District of Pennsylvania. The sole comment on the point at issue is as follows:

> "The wife of the defendant in a federal court is not a competent witness. *Graves* v. *United States, supra.*" Page 335.

This case was decided before the decision in *Hendrix* v. *United States, supra.* The Graves case had cited no authority for its holding and apparently the court did not deem it necessary to discuss the common-law rule.

Adams v. *United States* (C. C. A., Eighth Circuit, April 29, 1919), 259 Fed. 214, was decided after the Rosen case and before the Jin Fuey Moy case. The conviction was had in the Eastern District of Oklahoma. The trial court refused to permit the husband to be sworn as a witness in

behalf of his wife then on trial. It was held that this was not error, the court disposing of the point in the following language:

> "Counsel for defendant thinks it is time the above mentioned rule of the common law is changed, and cites *Rosen* v. *United States* (citation). The Supreme Court can overrule its own decisions, but until overruled they are binding on us." Page 214.

The court evidently was of the opinion that *Rosen* v. *United States* had overruled such prior cases as *United States* v. *Reid, supra,* and *Logan* v. *United States, supra,* but it was unwilling to follow the Rosen case to its logical conclusion and overrule *Graves* v. *United States* and *Hendrix* v. *United States.*

We think it pertinent to also point out that the court did not attempt to state or apply the local law as it existed in Oklahoma at the time of its admission as a State. We think it quite likely that the law of that State upon admission probably made the wife competent for her husband. It has been held by this same court in a subsequent case, *Neal* v. *United States, supra,* that this is the proper rule. Such a doctrine now seems to be generally accepted, beginning with the case of *Withaup* v. *United States, supra.*

This opinion was by a divided court and we feel constrained to set out in full the dissenting opinion of Circuit Judge Stone, as follows:

> "I am compelled to dissent, because I believe error was committed in the exclusion of the husband, who was offered as a witness. The wise public policy, which forbids a husband or wife to testify as to confidential communications, is intended by preserving such confidences from disclosure, to preserve unshattered the sacredness and integrity of the marriage relation, which is so vital to the stability of our civilization. The

thought is that married people should be made safe in their communications to each other by the assurance that neither will be permitted to violate such confidences. *It is essentially and solely for the benefit of the parties involved, and serves no further useful purpose.*

"Where both husband and wife voluntarily waive this confidence and desire the disclosure, not only does the sole basis of the rule, and therefore the rule itself, vanish, but there comes into force the cardinal consideration of presenting to the jury all possible information bearing upon the issues in the case. It may be entirely proper to hold that the preservation of the close marriage relation by strict protection of its confidences is more important than the procurement of conviction by evidence obtained through the rupture of that confidence, so basic in our civilization. I cannot conclude that such a purpose is consummated by closing mouths which both husband and wife wish opened to prove lack of criminality by either. Is the marriage relation or is society benefited by preventing a husband or wife from thus coming to the aid of the other in a time of dire need, and to promote justice?" Page 215.

In *Fitter* v. *United States* (C. C. A., Second Circuit, May 14, 1919), 258 Fed. 567, the court passed on the question of the competency of the wife offered by her husband then on trial. The decision is after the Rosen case and before the Jin Fuey Moy case. The trial court held the wife to be incompetent and the circuit court of appeals refused to reverse the decision. As we construe the opinion, however, it did so with some degree of reluctance. We quote from the opinion by Circuit Judge Rogers, as follows:

"It is also objected that error was committed in excluding the testimony of Fitter's wife who was called to give evidence for the defense. The common law rule made husband and wife incompetent as witnesses for or against each other in either civil or criminal proceedings. In some of the states the disqualification

arising from the relation of husband and wife has been removed by statute, but no statute has been passed on this subject by Congress. In *United States* v. *Reid* (citation) the court held that the competency of witnesses in criminal trials in United States courts must be determined by the rules of evidence which were in force in the respective states when the Judiciary Act of 1789 (Act of Sept. 24, 1789—Sec. 20, 1 Stat. 73) was passed. In *Rosen* v. *United States, supra,* the court concluded that 'The dead hand' of the common law rule of 1789 should no longer be applied to excluding of testimony of convicted felons. *"It may perhaps be said with equal reason that 'the same dead hand' should no longer disqualify husband and wife except as respects confidential communications."*

"If the trial judge had permitted Mrs. Fitter to testify this court would not readily have been inclined to hold that error had been committed. But *this* judgment of conviction certainly cannot be set aside because the court still adhered to the rule of the common law." Pages 576-577.

All of the subsequent cases came after the decision of Jin Fuey Moy. They are as follows:

Fourth Circuit—*Krashowitz* v. *United States* (July 5, 1922), 282 Fed. 599;

Fourth Circuit—*Barton* v. *United States* (Apr. 23, 1928), 25 Fed. (2d) 967;

Fourth Circuit—*Fisher* v. *United States* (May 3, 1929), 32 F. (2d) 602;

Fourth Circuit—*Dowdy and Funk* v. *United States* (Jan. 13, 1921), 46 Fed. (2d) 417;

Seventh Circuit—*Slick* v. *United States* (Sept. 2, 1924), 1 F. (2d) 897;

Ninth Circuit—*Lowe* v. *United States* (Aug. 7, 1922), 282 Fed. 597;

Ninth Circuit—*Fasulo* v. *United States* (Oct. 19, 1925), 7 F. (2d) 961;

Ninth Circuit—*Liberato* v. *United States* (June 21, 1926), 13 Fed. (2d) 564.

In the fourth circuit the Jin Fuey Moy case seems to be taken as controlling, and as we construe them the decisions are to the effect that a wife is incompetent for her husband in any of the Federal courts regardless of where the case may be tried.

In practically every one of these cases no effort is made to determine the common law as it existed in the States where these trials were had.

In *Slick* v. *United States* there is not a single citation of either a United States or Federal case supporting the holding, the only authority relied upon by the Circuit Court of Appeals for the Seventh Circuit being *Graff* v. *People,* 208 Ill. 318, 70 N. E. 299.

In *Lowe* v. *United States* the court merely says that the wife is incompetent, citing Jin Fuey Moy. This conviction was had in the District of Oregon. There is no attempt to discuss or to state what was the law of Oregon in this respect at the time of its admission. We think it likely that at the time the wife was not incompetent for her husband in that jurisdiction.

In *Fasulo* v. *United States,* on the authority of *Jin Fuey Moy* v. *United States,* a wife was held to be incompetent for her husband in the Northern District of California. Again there is no discussion of the common law of California at the time of its admission.

In *Liberato* v. *United States, supra,* it was held in the ninth circuit that the wife of the defendant was not competent as a witness for her husband upon the authority of *Jin Fuey Moy* v. *United States.* This case has been expressly disapproved and overruled by the same court. *Rendleman* v. *United States* (C. C. A. Ninth Circuit, March 21, 1927), 18 Fed. 27, 29.

It appears to us that these courts fail to recognize that the common law rule either of 1789 or of the date of admission controls. They seem to accept the Jin Fuey Moy case as holding generally that wives are incompetent to testify for their husbands in Federal courts anywhere.

One of the circuit courts of appeal, however, has squarely faced the fact that there is inconsistency between the decision in the Rosen case and the decision in the Jin Fuey Moy case as it is being construed by the respective circuit courts of appeal. The question was squarely presented in the ninth circuit in the case of *Rendleman* v. *United States* (Mch. 21, 1927), 18 Fed. (2d) 27. Opinion by Circuit Judge Hunt. Rendleman was tried in the District Court for the Western District of Washington for unlawful possession of morphine, and offered his wife as a witness in his behalf and she was excluded. A review of this ruling was the sole error assigned. The circuit court of appeals, upon the authority of *Louie Ding* v. *United States* (C. C. A. Ninth Circuit, 1918), 227 F. 12, *Withaup* v. *United States* (C. C. A. Eighth Circuit, Dec. 29, 1913), 127 Fed. 530, and *Brown* v. *United States* (C. C. A. Sixth Circuit, May 12, 1916), 233 Fed. 354, held that the test as to the competency of the witness was "what local law obtained at the time of the creation of the state, not what the law was at the time of the Judiciary Act of 1789." Page 27.

Reference is then had to the decision of *Rosen* v. *United States, supra,* which "adopted the modern view of holding the witness (a convict) was competent." Page 28. The court quotes with evident approval the following excerpt from the Rosen case.

> "In the almost twenty years which have elapsed since the decision of the Benson Case, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the

conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain." Page 28.

Reference is had to *Greer* v. *United States, supra,* which followed the Rosen case. The opinion then discusses the case of *Jin Fuey Moy* v. *United States* in the following language:

"The question of the right of the wife to testify in her husband's behalf was involved in *Jin Fuey Moy* v. *United States* (1920), 254 U. S. 189, 41 S. Ct. 98, 65 L. Ed. 214, upon a review of a conviction in the federal court of Pennsylvania. Regarding the point as hardly requiring mention, the court proceeded upon the concession that the wife was not a competent witness for all purposes; her evidence not having been admissible at the time of the Judiciary Act. For this statement *Logan* v. *United States, supra,* and *Hendrix* v. *United States, supra,* were the only cases cited. The court added: 'But, it is said, the general rule does not apply to exclude the wife's evidence in the present case because she was offered not in behalf of her husband, that is, not to prove his innocence, but simply to contradict the testimony of particular witnesses for the government who had testified to certain matters as having transpired in her presence. The distinction is without substance. The rule that excludes a wife from testifying for her husband is based upon her interest in the event, and applies irrespective of the kind of testimony she might give.'

"No reference was made to the Rosen Case, decided three years previously, although, as we have said, the opinion in the Rosen Case stated the contention that under the common law as administered in New York in

1789 the person called as a witness was incompetent. It seems to us that, if the Jin Fuey Moy Case is general as to all federal criminal trials where a wife is called to testify for her husband, then the principle recognized in *Rosen* v. *United States* has been restricted, and the district court held correctly in the case now before us. On the other hand, if the Jin Fuey Moy Case is applicable only to Pennsylvania, where the wife's evidence was not admissible at the time of the first Judiciary Act, then the rule of the Rosen and Louie Ding Cases obtains, and the lower court was in error.

"Considering the several cases, our judgment is that it was not intended by the Jin Fuey Moy Case to depart from the broader rule laid down in the Rosen decision, where the question was disposed of by overruling the common law practice." Pages 28–29.

Various decisions of circuit courts of appeal are referred to, the court giving particular attention to one of its own prior opinions, as follows:

"In *Liberato* v. *United States* (C. C. A. 1926), 13 F. (2d) 564, defendant was convicted of conspiracy in the District Court of Washington. Upon the trial the wife of defendant was called to testify in defendant's behalf. The record shows that, upon objection of the prosecuting attorney, defendant's counsel conceded that under the general rule she could not testify for or against her husband, but argued that he wished to prove certain physical facts which the wife knew of; thus assuming a position like that taken by defendant in the Jin Fuey Moy Case. The trial court held that she could not testify for or against her husband in any respect. Upon writ of error, this court accepted the admission of counsel and followed the Jin Fuey Moy Case.

"After re-examination of the question, we conclude that the decision in the Ding Case is correct and in accord with the Rosen Case, and that any rulings that we may have made inconsistent therewith must be modified." Page 29.

The judgment was reversed and the cause remanded for a new trial.

Subsequently the same court approved the Rendleman case in *Green* v. *United States* (C. C. A. Ninth Circuit, May 9, 1927), 19 Fed. (2d) 850.

As we see it, the decision in the Rendleman Case is directly at variance with all of the decisions in the Fourth, Seventh and Ninth Circuits, which we have cited as applying the Jin Fuey Moy case without limit and without distinction.

We realize that it may be possible to reconcile this case with the others by assuming that in West Virginia, South Carolina, North Carolina, Illinois, Oregon and California the rules of evidence prevailing under the common law at the time of the adoption of the Judiciary Act of 1789 or at the time of the admission of the States to the Union, as the case may be, might have made a wife incompetent for her husband, whereas the contrary may have been true in the State of Washington. If, however, this be the distinction, we again point out that no one of the courts in the Fourth, Seventh or Ninth Circuits has seen fit to direct attention to what the common law was in these respective States at either of the times mentioned. Moreover, a careful reading of the opinion in *Rendleman* v. *United States* does not disclose what the law was in the State of Washington with reference to the competency of the wife for her husband at the time of admission.

Again we point out that this opinion from the Ninth Circuit seems to take into consideration the thought at least that some courts may have construed the Jin Fuey Moy case as "General as to all Federal criminal trials where a wife is called to testify for her husband." Page 28. We think the decided cases in the other circuits are susceptible of such a construction.

Certainly, it appears to us that this case, taking into consideration the cases decided in the other circuits, leaves the law on this point in a state of confusion. That we are not alone in this view is quite apparent from the opinion of Circuit Judge Kenyon in the case of *Tinsley* v. *United States* (C. C. A. Eighth Circuit, Sept. 26, 1930), 43 Fed. (2d) 390. The comment on the point is perhaps dictum as is frankly stated in the opinion. However, the eminence of the distinguished jurist who wrote the opinion and his clear statement of the difficulties presented to himself and other inferior courts of the United States is so cogent and convincing that we take the liberty of quoting therefrom at great length, as follows:

> "The rule of the common law was that the wife of a defendant could not be a witness in a criminal case for a co-defendant if her testimony would tend directly to her husband's acquittal. 1 Greenleaf on Evidence §§ 334 and 335. The precise question here is the right of the wife of a defendant to testify in favor of a co-defendant in a matter that cannot assist or injure her husband in any way. There was no effort to have her testify in favor of her husband but for a co-defendant. If the ancient rule of the common law as to a wife not being permitted in a criminal case to testify in favor of her husband should be recognized, nevertheless it would be inapplicable to the situation here presented.
>
> "In view of this conclusion it is unnecessary for us to pass on the general question of the wife's competency or incompetency in the federal courts as a witness for her husband under the rules of the common law, or as affected by the statutes of the territory of South Dakota at the time of its admission as a state. See *Olmstead et al.* v. *United States*, 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944, 66 A. L. R. 376. We venture far enough, however, into the confused domain of the incompetency of witnesses under the common law and

the applicability of common-law rules on the subject to present conditions of affairs to suggest that practically all of the common-law disabilities of husband and wife have been swept aside in nearly all the states of the union. In this day and age when a married woman is exercising every civil and political right and when the world is progressing toward a more enlightened administration of justice, *to say that a wife cannot testify in favor of her husband in a criminal case because of some rule of the common law of* 1789, *which should be obsolete, is in the opinion of the writer an absurdity and a relic of legal barbarism which should not longer be recognized.* Such rule does not fit present conditions. Should we enter this field, however, it would be most difficult to harmonize the decision of the United States Supreme Court in *Rosen et al.* v. *United States,* 245 U. S. 467, 38 S. Ct. 148, 150, 62 L. Ed. 406, where the court considered the question of disqualification of a witness who had been convicted of a felony, and said, 'we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here,' and the language of Justice Holmes in *Greer* v. *United States,* 245 U. S. 559, 561, 38 S. Ct. 209, 210, 62 L. Ed. 469, 'It is argued that the Court was bound by the rules of evidence as they stood in 1789. That those rules would not be conclusive is sufficiently shown by *Rosen* v. *United States,* 245 U. S. 467, 38 S. Ct. 148, 62 L. Ed. 406,' with the decision of the Supreme Court in *Jin Fuey Moy* v. *United States,* 254 U. S. 189, 195, 41 S. Ct. 98, 101, 65 L. Ed. 214, where the court said: 'But a single point remains—hardly requiring mention—the refusal to permit defendant's wife to testify in his behalf. It is conceded that she was not a competent witness for all purposes, a wife's evidence not having been admissible at the time of the first Judiciary Act, and the relaxation of the rule in this regard by Sec. 858, Rev. Stat. U. S., being confined to civil actions. *Logan* v. *United States,* 144 U. S. 263, 299-302, 12 S. Ct. 617, 36 L. Ed. 429; *Hendrix* v. *United States,* 219 U. S. 79, 91,

31 S. Ct. 193, 55 L. Ed. 102. But, it is said, the general rule does not apply to exclude the wife's evidence in the present case because she was offered not in behalf of her husband, that is, not to prove his innocence, but simply to contradict the testimony of particular witnesses for the government who had testified to certain matters as having transpired in her presence. The distinction is without substance. The rule that excludes a wife from testifying for her husband is based upon her interest in the event, and applies irrespective of the kind of testimony she might give.' The Rosen Case certainly establishes the doctrine that the courts are not conclusively bound as to competency of witnesses by the rules of the common law as they stood in 1789.

"If the dead hand of the common-law rule of 1789 as to the incompetency of witnesses who had once been convicted of crime should no longer be applied, it is difficult to see why it should be applied in favor of the absurd proposition that a husband or wife cannot testify in favor of one another. It would seem a strange administration of justice that if a wife were the only witness who could show the innocence of her husband when he was accused of some serious crime in the federal court that her mouth must be sealed on account of some ancient doctrine that a wife should not be permitted to testify because of identity of interest or interference with domestic happiness, or for any of the other reasons, which Wigmore in his Law of Evidence, vol. 1, 600 and 601, sets forth and makes light of. He calls the rule a misguided one of the common law. Domestic happiness would seem to be invaded to as great an extent by having a husband executed for murder or sent to the penitentiary, as to have the wife testify to matters which might show his innocence, even though some family transactions were disclosed. * * * Pps. 895-896.

"We have felt justified in venturing slightly into this field because it is apparent that unless Congress passes some act making husband and wife competent to tes-

tify as witnesses for each other in the federal courts or unless the Supreme Court passes on the question in such a way as to harmonize the Rosen and Jin Fuey Moy Cases, *supra*, that many of the federal courts will refuse to follow this antiquated and fossilized rule of the common law, on the theory that if there ever was any reason for the same it has long since ceased to exist. Indeed, the Circuit Court of Appeals of the Ninth Circuit, in *Rendleman* v. *United States*, 18 F. (2d) 27, 28, attempts to distinguish the Jin Fuey Moy Case from the Rosen Case, on the theory that the Jin Fuey Moy Case is applicable only to Pennsylvania, 'where the wife's evidence was not admissible at the time of the first Judiciary Act,' and 'that it was not intended by the Jin Fuey Moy Case to depart from the broader rule laid down in the Rosen decision, where the question was disposed of by overruling the common law practice.' The court in the Rendleman Case holds in accordance with the general doctrine of the Rosen Case, refusing to be governed by the rule of the common law that a wife was not a competent witness in behalf of the husband." P. 897.

The opinion then quotes Mr. Leach, 43 Harvard Law Review, 565, as follows:

"Where are we now? An attempt to reconcile a line of authorities in which some later cases have been decided without reference to or apparent thought of earlier ones is probably futile mental gymnastics. It may be suggested, however, that the law of the respective states as of 1789 (*United States* v. *Reid*), or the date of admission of the State (*Logan* v. *United States*, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429), is applicable in the Federal criminal courts except so far as state legislation or judicial decisions have established a weight of authority in favor of a more modern view (*Rosen* v. *United States*). *Jin Fuey Moy* v. *United States can only be explained as an oversight with regard to a minor point in the case, or as an acceptance by the court of an improvident concession of counsel.*

"With good reason the lower federal courts confess their perplexity. Faced with the patent inconsistency of the Rosen and Jin Fuey Moy Cases, most of them take the easiest path by ruling that the latter decision establishes a uniform federal rule that the wife of a criminal defendant is not competent in his behalf, and that the former establishes a uniform federal rule admitting convicted felons. These courts habitally fail to refer to the law of the state in which the court was sitting in 1789 or at the time of the admission of the state into the Union. So far as these cases exclude the wife as a witness in states which prior to admission had passed statutes qualifying the wife as a witness, an erroneous result seems to have been reached. At least one court seems to think that the Reid and Logan Cases are still in full force. And some apply their view of the general weight of common-law authority without reference to any particular state. An examination of cases cited in the footnotes of this paragraph will indicate that at least one circuit court of appeals has assumed three inconsistent positions on this matter in the course of 10 years." P. 897.

As we see it Judge Kenyon has written for us a brief on the question that clearly shows the necessity at least for the granting of a writ of certiorari in this cause and a clarification and reconciliation of the opinions in the Rosen case and the Jin Fuey Moy case. When one of the Circuit Judges of the United States and a distinguished law-writer in one of the leading legal periodicals of the country confess to such bewilderment, as have Judge Kenyon and Mr. Leach, in connection with a question of law so often presented to trial courts by virtue of the very necessity of occasions which are constantly arising, it seems to us to admit of no argument that there is a real and urgent and vital need for a definite and positive statement from this Court that will no longer leave in doubt what rule should be applied as to the competency of a wife for

her husband in any one of the circuits or in any one of the district courts established by Congress.

In seeking to have this Court decide that the wife in the present case was a competent witness for her husband, we realize that we will be met with two objections.

1. This Court has no power to change the rules of law.

2. If this Court has done so in the Rosen case that merely weakens the weight of the Rosen case as authority and furnishes no excuse for a further exercise of an unwarranted power.

We wish to point out that the rule relied upon to make the wife incompetent first announced in the Reid case more than 80 years ago, was not the creation of the Federal courts. It was established by the ancient usage of England and announced by the English and early American courts. In the Reid case this Court did not adopt the rule of its own volition as being a wise and salutary rule of law. It merely determined that Congress by the Judiciary Act of 1789 had adopted the rule for the Federal courts. It admitted that it thus construed the Act of Congress by implication rather than by the express words or direct terms of the statute. Presumably it construed the act in accordance with its view of the intent and purpose of the Congress. Perhaps in the light of conditions then existing that intent seemed clear. It is now manifest that the application of the rule of the Reid case has resulted in conditions never contemplated by Congress. Certainly Congress never dreamed that a Federal court sitting in southern Georgia would be applying rules of evidence under the common law of 1789 and another such court sitting a few miles away in northern Florida would be applying entirely different rules prescribed by a territorial legislature at the time of Florida's admission to the Union years later than 1789. It is of course problematical whether the first Con-

greses had in mind the extension of the territory of the United States beyond the confines of the then thirteen States and their possessions. Surely Congress did not intend that Federal court sitting in North Carolina would permit a person convicted of infamous crime in South Carolina to be sworn as a witness but deny such privilege to a person convicted of the same crime in the courts of North Carolina. Surely Congress did not intend that a Federal court sitting in Philadelphia would hold that a convict under the laws of Pennsylvania was competent as a witness but a convict under the laws of the United States enforced by its courts in Pennsylvania was not competent. And finally, surely Congress did not intend by any rule that it established to say that felons and convicted perjurers were to be competent witnesses in the courts of the Government, but such courts would not hear a wife on behalf of her husband. The history of judicial decision on the subject shows clearly that in the Reid case the court must have misinterpreted the purpose of Congress in adopting the Judiciary Act of 1789 insofar as rules of evidence in criminal cases are concerned.

If the Reid case was correctly decided, then by the adoption of the Judiciary Act of 1789 Congress did a most remarkably illogical thing. It was confronted with the task of prescribing rules of evidence for the Federal courts then being created. It realized the difficulty of covering the general field of evidence by legislative action. There was ready at hand the rules of evidence at common law then prevailing in all of the States of the Union without substantial difference. It was the logical thing to rely upon the common-law rules of evidence as the law of the Federal courts. But it must be remembered that these very same rules of evidence were not the result of legislative fiat. They had been brought into existence and into their then satisfactory condition by the courts of England

and America. If they commended themselves to Congress as being sound, this was a tribute to the judiciary responsible for their creation and development. Congress must have known that these rules had not remained static, but that under the wise decisions of the courts had grown and developed; had been modified to meet changing conditions; had adapted themselves to progress and enlightenment. The flexibility of the common law was then as it had been; is now, and always will be, a characteristic of that system which constitutes one of its chief charms and endears it to the English-speaking people. It had life and growth within it and of itself. It did not always require legislative action as a stimulus to progress or change. Yet under the doctrine of the Reid case we are asked to believe that it was the purpose of Congress to take this living, growing, changing body of the common law and hand it to the newly-created Federal courts with the proviso, however, that all life and growth and change by judicial care must stop forthwith and henceforth it must become a lifeless, changeless, dwarfed and stunted system. The new Federal judges could not be trusted to carry on the work of their illustrious judicial predecessors who had made available to Congress the system it chose to establish. The common law was to be availed of but it must cease to be the common law because it was denied the power or the right to exist as a live growing thing and if denied such power and right it must of necessity die. We insist that the Congress had no such illogical purpose. It did intend to adopt the rules of evidence as they then existed at common law, but it expected those rules to live and be adapted to changed conditions, and modern and enlightened thought in the discretion of the courts charged with the responsibility of enforcing them just as had been the case in our courts since the time "whence the memory of man runneth not to the contrary." It expected the Federal judiciary to be

primarily responsible for the life and progress of such rules subject, of course, to the superior will of the legislative branch of the Government when it chose to exercise that will. This is logical construction of the Act of 1789 and the legislative intent with reference thereto. The construction of the Reid case is an illogical one. Our construction would produce uniformity instead of the diversity which permits a woman to testify for her husband in the State of Washington but denies her that privilege in Pennsylvania. Moreover such a construction serves to make possible a fair, intelligent and proper administration of the law, which result certainly has not been attained by adhering to the Reid case.

We ask the Court to consider anew the Judiciary Act of 1789 and the legislative purpose behind it "in the light of general authority and sound reason," taking into consideration "the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons * * * rather than by rejecting witnesses as incompetent," and with due regard to these enlightened and modern views which "proceed upon sound principle." We ask the Court to now determine that the Act of 1789 was not intended by Congress to deny to husband and wife privileges accorded to felons, and we are confident that this Court not only has the power to so declare, but that it has the right so to do without exceeding recognized and accepted principles of judicial authority.

Point B.

Evidence of statements made by an alleged co-conspirator to a third party are not admissible unless made during the existence of the conspiracy and in furtherance of it.

The witness Buckner was permitted to testify to a conversation with the witness Martin prior to the formation

of the alleged conspiracy and not in furtherance of same (R. 8, 24). It was manifestly prejudicial.

In the first trial of this cause in the circuit court of appeals, the court, in its opinion, said:

> "No citation of authority is necessary to sustain the proposition that the acts and declarations of a co-conspirator made in furtherance of the conspiracy and during its continuance are binding upon all the conspirators." *Dowdy & Funk* v. *United States* (C. C. A., Fourth Circuit, Jan. 14, 1931), 46 Fed. (2d) 417, 424.

We feel that it is equally certain that acts and declarations made either before the conspiracy or after it is concluded and not in furtherance of same are inadmissible. That the conversation complained of occurred prior to the formation of the conspiracy, we refer to *Dowdy & Funk* v. *United States, supra,* at page 422.

As to the question of whether Buckner's evidence is admissible to corroborate Martin, we also rely upon the case of *Dowdy & Funk* v. *United States, supra.* Discussing evidence of a similar character, the court lays down certain conditions which should govern its introduction and adds:

> "And the jury should be carefully cautioned that the evidence is to be considered only as affecting the credibility of the witness; and it should never be admitted as substantive or independent supporting testimony. 40 Cyc. 2789, text, notes, and cases cited; *Di Carlo* v. *U. S.* (C. C. A., 2d) 6 F. (2d) 364; *Boykin* v. *U. S.* (C. C. A., 5th), 11 F. (2d) 484, 486.
>
> "See also *Wigmore Ev.*, §§ 1122-1129, where the whole subject is fully discussed.
>
> "Compare remarks of Mr. Justice Story, argumendo, in *Ellicott* v. *Pearl,* 10 Pet. 412, 439, 9 L. Ed. 475.
>
> "In our opinion, in admitting this class of evidence, the court should be extremely guarded and admit it only subject to the proper restrictions and conditions

prescribed; for otherwise a designing witness might easily prepare the foundation for corroborating his testimony in this manner, and impose upon the court and jury and bring about a miscarriage of justice." Page 424.

Later on the same page the opinion points out that the trial court cautioned the jury that they were to receive this evidence merely in corroboration and not as substantial evidence, and therefore it was held that there was no error in its admission. The converse of this is unquestionably true, that had the court not so cautioned the jury it would have been error to have received the evidence. The record of the present case fails absolutely to show any such caution to the jury. It is our contention that under the rule established by the Circuit Court of Appeals for the Fourth Circuit in this very case the evidence was improperly admitted and was prejudicial.

POINT C.

If an indictment describes a conspiracy by naming the time of its formation, the parties thereto as well as the method by which it was to be effected, proof of a conspiracy formed at a different time, with different parties and for a different purpose, will not support such an indictment. In such case there is a fatal variance between the allegations and proof and a failure to direct a verdict for the defendant upon proper motion is a denial of the defendant's constitutional rights under the 5th and 6th Amendments to the Constitution of the United States.

In the present case the indictment charges (*a*) the formation of a conspiracy on or about July 5, 1928, (*b*) by the defendant and Dowdy and Martin, (*c*) for the purpose of violating the National Prohibition Act, (*d*) the defendant to aid and abet the other conspirators in the manufacture and

transportation, etc., of ardent spirits, (*e*) by using his official position to protect them from detection and arrest (R. 2-3).

The evidence of the Government's witness Martin (R. 7-12) shows that the defendant, if guilty of anything, was guilty of blackmail and extortion. If there was any conspiracy it was formed subsequent to September 28, 1928 (R. 9). Also see *Dowdy & Funk* v. *United States* (C. C. A., Fourth Circuit, Jan. 14, 1931), 46 Fed. (2d) 417, 421. Dowdy was not a party to any such agreement. For this reason the circuit court of appeals held in the last referred to case that the trial court should have directed a verdict for Dowdy on the first trial. On the second trial, which is here under review, there was no evidence connecting Dowdy with any conspiracy. The petitioner Funk never had any agreement to aid and abet in the manufacture and transportation of liquor or to use his position to protect anyone from detection and arrest.

The testimony of Martin (R. 7-12), if it shows anything, shows that Funk and himself extorted money from persons who had been theretofore detected as violators of the law upon representations that they would cause pending prosecutions to be abandoned. The only possible exception is the so-called Burlington raid (R. 10-11).

> "In determining whether a variance is material, the question to be decided is, does the indictment so far fully and correctly inform the defendant of the criminal act with which he is charged that; taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense." *Underhill's Criminal Evidence* (3d Ed.), Sec. 80, p. 75.
>
> "The allegations and proofs must correspond in a criminal case, and proofs without allegations are as

ineffectual as allegations without proofs." *Rabens* v. *U. S.*, 146 F. 978, 77 C. C. A. 224 (Fourth Circuit).

"To try a person for a different offense than the one charged in the indictment or information would seem on principle to be in violation of the Fifth and Sixth Amendments being intended to afford the defendant opportunity to meet the charges against him and to apprise him of the nature of the accusation which he will be called upon to meet at the trial." *Zoliné's Fed. Crim. Law and Proc.*, Vol. 1, Sec. 415, pps. 345-346.

It is submitted that while the indictment in the case may have gone more into detail than was necessary, yet if the Government chose to describe the conspiracy charged against the defendant in detail it was incumbent on it to prove the conspiracy as charged. It failed to do so. The result was to affirmatively mislead the defendant as to the nature and character of the charge he was called upon to meet. This constitutes a fatal variance.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

CHAS A. HAMMER,
JOHN W. CARTER,
ALLAN S. ADAMS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 394

JOHN S. FUNK, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

CHAS. A. HAMMER,
Harrisonburg, Va.;
ALLEN ADAMS,
Greensboro, N. C.;
JOHN W. CARTER, JR.,
Danville, Va.;
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 394

JOHN S. FUNK, PETITIONER AND APPELLANT BELOW,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT AND APPELLEE BELOW.

BRIEF FOR PETITIONER.

I.

Opinion of Court Below.

The opinion on appeal in the United States Circuit Court of Appeals for the Fourth Circuit is reported in 66 Fed. (2d) 70.

II.

Jurisdiction.

A statement of the grounds on which the jurisdiction of this Court is invoked has been set forth in the brief in support of petition for writ of certiorari (pages 7-9). It is therefore not here repeated.

III.

Statement of the Case.

The appellant, John S. Funk, was convicted in the District Court of the United States for the Middle District of North Carolina on a charge of conspiracy to violate the National Prohibition Act (R. 1, 45, 54).

The government's case was largely dependent upon the evidence of one Charlie Martin, who was an admitted co-conspirator, and who was not indicted because used as a government witness (R. 2, 7-16). During the course of his evidence, Martin testified to a number of acts and statements of the appellant in the presence of the wife of the appellant, and also to telephone conversations between Martin and the wife of the appellant, all of which were highly incriminating (R. 10, 12, 15, 16). At the close of the government's case, the appellant offered his wife as a witness in his behalf. Upon objection by the government, she was not permitted to testify, nor was she permitted to state for the record what her testimony would be (R. 29).

Upon conviction the appellant was sentenced to imprisonment in the Federal Penitentiary at Atlanta, Georgia, for one year and one day (R. 54, 64). An appeal from said judgment was taken by the appellant to the United States Circuit Court of Appeals for the Fourth Circuit, which affirmed the judgment of the District Court (R. 70).

IV.

Specification of Errors.

The District Court erred in sustaining the objection of the government to the competency of the appellant's wife as a witness in his behalf, and the Circuit Court of Appeals erred in not reversing the judgment for this reason.

V.

ARGUMENT.

Summary of Argument.

POINT A. The wife of a defendant charged with crime in the federal courts is a competent witness for her husband. This Court, by its order of October 16, 1933, has limited the argument in this case "to the question as to what law is applicable to the determination of the competency of the wife of the petitioner as a witness." (R. 71).

Point A.

In the brief in support of petition for writ of certiorari, an effort was made to trace the judicial history of the pronouncement of this Court in the case of *Jin Fuey Moy* v. *United States* (December 6, 1920) 254 U. S. 189, 65 L. Ed. 214, 41 S. C. R. 98, which pronouncement has been taken by many of the Circuit Courts of Appeals as a definite holding that the wife of a defendant in a criminal trial in the courts of the United States is not competent as a witness on behalf of her husband. We sought to attack the soundness of such a rule; to demonstrate that it had been the subject of severe criticism by at least some of the inferior federal courts, and to show that these inferior courts manifested a state of perplexity and confusion because of the patent inconsistency between the decision in the *Jin Fuey Moy* case, *supra,* and the case of *Rosen* v. *United States* (1918) 245 U. S. 467, 62 L. Ed. 406, 38 S. C. R. 148. We further attempted to show that for more than 40 years this Court and the inferior federal courts have been obviously seeking to avoid the full force and effect of the decision in *United States* v. *Reid* (1851) 12 How. 361, 13 L. Ed. 1023, and have been ingenious in finding reasons to except par-

ticular cases from the operation of the rule first announced in that case. We pointed out that the rule of the *Reid* case had been definitely abandoned by this Court in the decision of the *Rosen* case, *supra*, and that apparently without the aid of legislation by Congress.

It may be that the argument advanced in that brief may properly be termed destructive criticism, rather than constructive suggestion. We, of course, desire that the Court shall read our brief in support of the petition as an argument on the merits of the question involved. However, in this brief we shall attempt to advance our idea of what the law should be, rather than a criticism of the decided cases. In other words, we shall attempt to answer the Court's query contained in the order allowing certiorari, to-wit, "What law is applicable to the determination of the competency of the wife of the petitioner as a witness?" (R. 71).

The only argument that can be advanced in favor of the doctrine that a wife is incompetent to testify for her husband in criminal trials in the federal courts must have as its foundation the reasoning and the logic of the *Reid* case.

The *Reid* case undertook to construe the purpose and intent of Congress, as expressed in the Judiciary Act of 1789. We shall advance three propositions, and if we are correct in any one of the three, the wife of the appellant Funk was a competent witness in his behalf in the present case.

These propositions are as follows:

(1) The *Reid* case was wrongly decided. The court did not properly interpret the Congressional intent.

(2) Conceding that the *Reid* case was properly decided, and that the court did correctly state the purpose of Congress as expressed in the first Judiciary Act, the effect and

meaning of that decision has been misconstrued by both bench and bar.

(3) Assuming that we are entirely wrong in our Propositions 1 and 2, Congress has, by subsequent legislation, manifested a purpose and intent to make the wife a competent witness for her husband in criminal trials, in the light of cases decided by this Court, construing other Acts of Congress, and in accordance with the most conservative conception of *stare decisis*.

Proposition No. 1.—We appreciate fully the very radical position taken in the statement of this proposition. We are apprehensive that the Court may feel that we are bold to the point of rashness in suggesting that the decision in the *Reid* case, which has been the accepted law for eighty-two years, shall be lightly brushed aside. Nevertheless, we seriously contend that a careful re-examination of that case might well convince the Court that the construction placed on the Judiciary Act of 1789 in the opinion of Mr. Chief Justice Taney was erroneous.

We again direct attention to the fact that Congress did not prescribe "in express words the rule by which the courts of the United States are to be governed in the admission of testimony in criminal cases." We point out that this Court found it necessary to look beyond the express language and the direct terms of the Judiciary Act in order to ascertain the Congressional intent. Neither the Judiciary Act of 1789 or the Crimes Act of 1790 made any "express provision concerning the mode of conducting the trial after the jury are sworn," nor do either of them "prescribe any rule by which it is to be conducted, nor the testimony by which the guilt or innocence of the party is to be determined." Please remember that these are not our conclusions, but the statements made by this Court in the *Reid*

case. The court then concluded that it was obvious "that some certain and established rule upon this subject was necessary to enable the courts to administer the criminal jurisprudence of the United States," and that it was "equally obvious that it must have been the intention of Congress to refer them (the courts) to some known and established rule." This conclusion of the court is not based upon anything that Congress said in the Judiciary Act or the Crimes Act. It is an inference drawn by the court. It is a construction of the statute admittedly by implication. Indeed, the court says, "This is necessarily to be implied from what these Acts of Congress omit, as well as from what they contain."

Because of a conclusion reached by such a method, the court holds that "the rules of evidence in criminal cases are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed." May we say, with all deference, that we are not so sure of the correctness of this construction of the statute, and of this statement of the Congressional purpose.

The personnel of the first Congress was remarkably high in intellectual standards and attainments. A number of them had served in the Continental Congresses and in the Constitutional Convention of 1787. As a rule they were thoroughly familiar with the English system of government and jurisprudence. They were versed in the history, the tradition, and the learning of the common law, as one of the most precious heritages that the American States had received at the hands of their English forebears. They knew that the law of procedure in the English courts, and in the courts of the newly formed American States had been almost entirely the product of the judiciary, rather than the legislative, branch of the government. They knew that the rules of evidence, administered by the courts, both

in England and America, bore scarcely a trace of legislative action and influence. The judges of England and America, from time immemorial, had formulated, announced, enforced, improved, modified, and adapted these rules to changing conditions and to progressive action and thought, with little, if any, aid by way of legislative action.

The members of the first Congress knew that the codification of a set of rules of evidence by a legislative body was highly impractical; that the determination of such a set of rules was peculiarly a function that could be best exercised by the courts who lived with these rules from day to day and applied them in the ordinary practice of the courts in performing their functions as the agency of the government by which justice was administered.

Why is it necessary for us to assume that Congress did not intend to give the federal courts a free hand in this respect, when we know that the courts of the respective States and the courts of the mother country had had such a free hand since the early dawn of English liberty? Why must we assume, not because of anything that Congress said, but because of what Congress did not say, and by some manner of implication, that Congress intended to depart from the policy that had been theretofore pursued by all of the English-speaking legislative bodies?

Moreover, if it was the purpose of Congress to make this radical departure from historical legislative precedent, it seems to us inconceivable that it did not see the necessity of saying so in plain, positive, and direct language that would have left nothing to the realm of construction. The mere fact that Congress did not venture into this field seems to us conclusive that it intended to make the federal courts responsible for the rules of evidence controlling in those courts.

We therefore seriously and earnestly contend that the construction of the Judiciary Act of 1789 which we have

here advanced is more logical, more reasonable, and more likely a correct statement of the Congressional intent, than that which is found as the announced doctrine of the *Reid* case. It certainly has the virtue that it is in accord with the experience of the past among the English-speaking people, and that it is not dependent upon speculation or implication, nor does it require that language be read into the Act of 1789 which cannot, in fact, be found there.

Proposition No. 2.—We realize fully that the rule of *stare decisis* tends to "consistency and uniformity of decision," and that this Court will be very slow to accept our viewpoint as expressed in Proposition No. 1, because to do so would, of course, make it necessary to overrule the line of cases beginning with the *Reid* case and coming down through the years since that time. We therefore, in this branch of our discussion, accept the decision in the *Reid* case as sound and as the law of the land. We deem it proper to point out, however, what we conceive the *Reid* case to actually say, as against what we believe to be the popular conception among bench and bar as to its holding. Carelessly stated, the profession generally seem to take it that the *Reid* case holds that the rules of evidence in criminal cases are the rules which were in force in the respective States when the Judiciary Act of 1789 was passed, and *that these rules continue in effect until and unless Congress shall change or modify them by appropriate legislation.*

At least it is our view that this is the conception of the *Reid* case decision, particularly as it applies to the competency of a wife as a witness for her husband. We do not think that the courts have been so strict in their construction of the decision as it applies to other rules of evidence, and this we shall attempt to point out.

As we see it, the popular conception of the *Reid* case as we have stated it, is entirely erroneous. The final conclusion of the court is stated as follows:

> "But the rules of evidence in criminal cases, are the rules which were in force in the respective States when the Judiciary Act of 1789 was passed. Congress may certainly change it whenever they think proper, within the limits prescribed by the Constitution. But no law of a State made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases; and the testimony of Clements was therefore properly rejected, and furnishes no ground for a new trial" (Page 366).

Analyzing this conclusion, here is what we understand the court to say:

(1) The rules of evidence as of 1789 are the rules for the federal courts;

(2) Congress may change these rules when it thinks proper;

(3) No state action since 1789 can have the effect of changing the rules.

As we see it, the finding is (*a*) to establish the rules; (*b*) to state the elementary principle that the legislative branch of the government may, if it chooses to do so, exercise its superior will to change the rule; (*c*) to state a necessary proposition to the effect that the legislative action of entirely different sovereignties from that of the federal government cannot be permitted to control or to influence its prosecutions.

There is no language expressly forbidding the federal courts from changing or modifying the rules, as changed conditions might require. There was nothing new in the Court's statement to the effect that Congress might change

the rules of evidence. The legislative bodies in the respective states and in England had always had such a power and, upon rare occasions, had exercised it.

This was no new principle of either government or law, and we insist that its restatement here was not intended to tie the hands of the federal courts and prevent the orderly, logical, and natural evolution and development of the law of evidence by the same process that had been responsible for those rules as they then existed.

In other words, the *Reid* case did not mean to hold, in any event, that Congress intended by the Act of 1789 to adopt the common law rules of evidence as a statute. The *Reid* case did not intend to hold that by virtue of this Congressional action, these rules were to become rigid and static, not susceptible to growth or change except by the stimulus of legislative action. It is inconceivable that Congress could have presented the federal courts with rules of evidence that were alive and growing, and in the same breath determined that henceforth life and growth must end. This is inconceivable as the purpose of Congress, and the *Reid* case does not hold that Congress had any such purpose.

Section 2 of the Code of Virginia is as follows:

> "The common law of England, so far as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except in those respects wherein it is or shall be altered by the General Assembly."

Similar provisions are found in constitutions of many of the states, particularly in the older states. And yet we have never heard it contended that because a state has adopted the common law of England, that by reason of that fact, the courts must go back and try to determine

what that common law was 150 or 250 years ago, and cannot depart from the principles of common law as it then existed, except by legislative aid.

The modifications of the common law since the fourth year of the reign of James I (1607), which is the date that the common law of England became effective in the Commonwealth of Virginia, have been innumerable, and the courts have not been too scrupulous to ascertain whether the changes and modifications which they have announced have had the sanction of legislative action. The same is true in practically every state in the Union.

If the decision in the *Reid* case is sound, as we are now conceding, it could have meant no more than the constitutional provision to which we have referred, and other like provisions in constitutions of other states. And yet we daresay that no one has ever contended that such provisions have been intended to crystallize and harden the elastic, adaptable principles of the common law into the form and shape of a statute as unchangeable as the law of the Medes and Persians, except by will of some legislative body. Such could not have been the purpose of Congress in enacting the Judiciary Act of 1789, and such was not the decision of the *Reid* case.

If the common law rules as they existed in 1789 were adopted by Congress, as the *Reid* case apparently holds, then both Congress and the Court expected those rules to be modified and changed by the courts as the occasion might require in the discretion of the courts, except and when Congress chose to exercise its superior will and forbid such practice in some respect.

And this has been the practice in the federal courts when it dealt with questions of competency of witnesses and admissibility of evidence that are not related to the question of husband and wife. For some strange reason, the strict

conception of the *Reid* decision that we have stated seems to be applied only where it is sought to have a wife testify for her husband or a husband for his wife.

In the brief in support of the petition, we discussed at great length the case of *Rosen* vs. *United States, supra.* There can be no question that this Court has absolutely departed from the common law rule of 1789 insofar as that rule affected the competency as witnesses of persons convicted of infamous crime. And there can be no question but what, almost without exception, the inferior federal courts and the commentators take it that that action of this Court was brought about by judicial construction, and not by legislative aid.

We do not care to multiply cases of this character, but we cannot refrain from pointing out a striking instance of where one of the federal courts, while careful to apply the strict rule of 1789 as against the wife as a witness for her husband, felt entirely free to relax it in a rather important respect. The case we refer to is that of *Dowdy and Funk* v. *United States* (C. C. A. 4th Ct., Jan. 13, 1931), 46 Federal (2d) 417. It happens to be the first trial of the present case in the Circuit Court of Appeals. In the trial court, Funk had offered his wife as a witness in his behalf. The court ruled that she was not competent. Upon appeal the Circuit Court of Appeals promptly, and with very little discussion, held that the ruling was correct; that the wife was not competent in the federal courts, and that this court had so held. It was not deterred from this ruling by consideration of the *Rosen* case, *supra* (Pages 420 and 421). Of course every authority that it cited went back to the old rule of 1789 as the reason for such a holding.

In the very same opinion another question of the law of evidence was presented on this appeal. The government witness Martin (admittedly a co-conspirator) had made

certain statements to a Special Inspector of the Prohibition Bureau. The statements were made after the alleged conspiracy had concluded and were not in furtherance thereof. "These statements were nothing more than a confession by Martin, implicating Funk" (Page 425). Nevertheless, the trial court permitted the inspector to testify as to what was said to him by Martin on this occasion, upon the theory that this evidence corroborated Martin's direct testimony.

Now it is quite true, as was pointed out by the court, that the general rule prevailing throughout the United States is that such evidence is inadmissible. Permit us, however, to point out that the court, in its opinion, said:

> "The counsel for the government, however, cites certain decisions of the Supreme Court of North Carolina in support of his contention that this and similar testimony is admissible; and it is probable that the learned judge who tried the case relied upon the North Carolina practice in that respect. In that state, the rule appears to be established that when a witness has given evidence and his credibility is impugned, whether by proof of general bad character, contradictory statements, or by cross-examination tending to impeach his veracity or memory, or at times by his very position in reference to the cause and the parties, 'in whatever way the credit of the witness may be impeached,' evidence of his previous statements is admissible in corroboration. Nor does it signify whether the previous statements are near or more remote from the occurrence, nor *ante litem motem,* or pending the controversy. In other words, it appears that in that state, the restrictions and conditions attaching to the admissibility of such evidence, as laid down in other jurisdictions by great weight of authority, do not obtain. *State* v. *Pace,* 159 N. C. 462, 74 S. E. 1018; *State* v. *Neville,* 157 N. C. 591, 72 S. E. 798; *Chrisco* v. *Yow,* 153 N. C. 434, 69 S. E. 422; *Cuthbertson* v. *Austin,* 152 N. C. 336, 67 S. E. 749; *Matthews* v. *Metropolitan Ins.*

Co., 147 N. C. 339, 61 S. E. 192, 18 L. R. A. (N. S.) 1219; *State* v. *Exum*, 138 N. C. 599, 50 S. E. 283" (Pages 425, 426).

From this excerpt it is quite apparent that the trial court, in admitting this evidence, was following the common law as it existed in the State of North Carolina, and presumably as it existed there in 1789. Did the Circuit Court of Appeals follow the North Carolina Rule of 1789? It did not, but said:

> "We do not think that the federal courts in a criminal case should be bound by or follow these decisions. With great deference to the views of that (North Carolina) court, we think the admission of such evidence, practically without restriction or limitation, is fundamentally unsound, and destructive of the most vital rights of one accused of crime" (Page 426).

In other words, this very appellant has been confronted with this situation, to wit, that when a rule of evidence, admittedly the common law rule of the state in which the federal court was sitting, appeals to the federal court as "fundamentally unsound, and destructive of the most vital rights of one accused of crime," then the federal court will not follow the rule, unless it be the archaic one that prevents one spouse from testifying for the other.

The study of the cases on this subject which we have made during the course of the various trials of this case has caused us to attempt to find an answer to the puzzling problem of why the federal courts have seemed so reluctant to relax the rule of 1789 with reference to a husband and wife, and yet so ready to relax it in other cases such as those to which we have directed the Court's attention.

We believe the answer is found in a certain peculiar cast of the judicial and legal mind with reference to the matter of confidential communications. The lawyer, from the be-

ginning of his training as such, is taught to hold as sacred all communications of a confidential nature. It is ingrained into his very nature, throughout his years as a student and as a practitioner; it becomes almost second nature with him.

Of course the common law rules, which have been very rarely modified by statute, still hold inviolate communications by husband to wife, or vice versa, and will not permit one spouse to reveal such communications upon the witness stand, or to testify to matters which came to their knowledge because of and during the marriage relationship. Of course this reason is entirely different from the one which prevented one spouse from testifying for another. The old common law reason for such a rule was presumably self-interest. But it is not inconceivable to us that subconsciously, perhaps, the legal mind has confused the two propositions, and there has been an inherent indisposition to relax the rule in the latter case because of a fear that it might affect the rule in the former.

We insist that this Court may now hold that the Judiciary Act of 1789 did, in fact, establish the rules of evidence as of that time as the rules of evidence in the Federal Courts, but that that Act also intended to confer upon the Federal Courts the power to modify those rules and to adapt them to changing conditions. We insist that such a holding does not do violence to the decision in the *Reid* case, or to any other decision of this Court; and moreover, it is certainly supported by the holding of this Court in the *Rosen* case, *supra*, and in the case of *Greer* v. *United States* (Jan. 28, 1918), 245 U. S. 559, 62 L. Ed. 469, 38 S. C. R. 209.

Proposition No. 3.—Convinced as we are of the logical correctness of our Proposition No. 1, we frankly admit our doubt of the willingness of this Court to follow us, in the light of the decided cases. We are firmly of the opinion that our Proposition No. 2 can be accepted by this Court

without running contrary to the doctrine of *stare decisis*. However, in the event that we are wrong in this respect, we insist that, under the accepted principles of that doctrine, this Court should hold that Congress itself has by statute manifested a purpose to remove the common law disqualification of the wife as a witness for her husband. We cite as authority for this proposition the *Reid* case, *supra;* the case of *Benson* v. *United States* (Dec. 5, 1892), 146 U. S. 325, 36 L. Ed. 991, 13 S. C. R. 60; and the *Rosen* case, *supra.*

In the *Reid* case, just before announcing its conclusion that "the rules of evidence in criminal cases are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed" (Page 366), the court had sought to determine just what rule Congress did have in mind to be applied in the federal courts. It finally concluded as follows:

> "* * * And the only known rule upon the subject which can be supposed to have been in the minds of the men who framed these Acts of Congress was that which was then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts" (Page 365).

And then the court adds this striking and significant language:

> "And this view of the subject is confirmed by the provisions of the Act of 1789, which refers its courts and officers to the laws of the respective states for the qualifications of jurors, and the mode of selecting them. And as the courts of the United States were in these respects to be governed by the laws of the several states, it would seem necessarily to follow that the same principles were to prevail throughout the trial; and that they were to be governed in like manner, in

> the ulterior proceedings after the jury was sworn, where there was no law of Congress to the contrary'' (Pages 365-366).

Here is a holding to the effect that, because Congress referred its courts to the laws of the respective states for the determination of the qualifications of jurors and the mode of selecting jurors, therefore the court must assume that Congress intended those courts to follow the same principles throughout the trial, and particularly as to rules of evidence.

In the *Benson* case, which we have discussed at some length in the brief in support of the petition, the court held that a codefendant, not on trial, was a competent witness for the government against the defendant on trial. It indeed recognized the harsh and strict rule of the old common law in the following language:

> ''Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors'' (Page 336).

It then points out the modern trend of the courts with respect to the matter of competency of witnesses, as follows:

> ''But the last fifty years have wrought a great change in these respects, and today the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction'' (Page 336).

And it then directs particular attention to two Acts of Congress, as follows:

> "By Congress, in July, 1864 (Rev. Stat. 858), it was enacted that 'in the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried,' with a proviso as to actions by and against executors, etc. And on March 16, 1878, it also passed an Act permitting the defendant in criminal cases to testify at his own request. 20 Stat. at L. 30" (Page 336).

After citing these statutes, the court then says:

> "In the light of these authorities and this legislation of Congress, there is less difficulty in disposing of this question. If interest and being a party to the record do not exclude a defendant on trial from the witness stand, upon what reasoning can a codefendant, not on trial, be adjudged incompetent?" (Page 337).

In other words, one of the principal reasons that the court assigns for its holding to the effect that this particulary codefendant was competent, is the Act of Congress of March 16, 1878, 20 Stat. at L. 30, Title 28 U. S. C. A. Par. 632, which permits a defendant in criminal cases to testify at his own request. The opinion proceeds upon the theory that the reason for the exclusion of the codefendant as a witness was based upon his interest in the outcome of the trial, and that if the interest of the defendant shall not act to exclude him, then certainly a codefendant should not be excluded.

In the *Rosen* case *supra,* the court held that the common law rule of 1789 should no longer act to exclude as a witness a person convicted of infamous crime. In reaching this conclusion, there was much discussion of the *Benson* case, and of the modern trend and disposition of courts and of

legislative bodies to remove disabilities from witnesses "under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in the case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent." The court then says:

> "Since the decision in the *Benson* case we have significant evidence of the trend of congressional opinion upon this subject in the removal of the disability of witnesses convicted of perjury (Rev. Stat. 5392, Comp. Stat. 1916, 10,295) by the enactment of the Federal Criminal Code in 1909 (35 Stat. at L. 1088, chap. 321; Comp. Stat. 1916, 10,165) with this provision omitted and 5392 repealed. This is significant, because the disability to testify, of persons convicted of perjury, survived in some jurisdictions much longer than many of the other common-law disabilities, for the reason that the offense concerns directly the giving of testimony in a court of justice, and conviction of it was accepted as showing a greater disregard for the truth than it was thought should be implied from a conviction of other crime" (Page 471).

Immediately after this excerpt, the conclusion is announced that destroys the common law rule of 1789 as applied to convicts.

This conclusion is based, certainly in part, and as we see it, in great part, upon the Act of Congress referred to, which removes the disability of witnesses convicted of perjury. In other words, this court felt warranted in holding that when Congress removed the disability of a convicted perjurer, it intended to remove the disability of all persons convicted of any infamous offense.

Now what is the logical conclusion from these three decisions? We summarize them:

(1) Congress referred its courts to the local laws in the matter of competency of jurors and mode of selecting them. Therefore, Congress intended that these same courts should look to these same local laws in all matters of procedure during the course of the trial, including the laws of evidence.

(2) Congress made a defendant in a criminal case competent as a witness at his own request. Therefore, Congress intended that a codefendant should be permitted to testify against the defendant on trial, because if the interest of the defendant did not prevent his taking the stand, the interest of the codefendant should not.

(3) Congress provided that conviction of perjury should not disqualify as a witness in the federal courts. Therefore, Congress must have intended that no conviction of any crime, however infamous, should act to exclude such a convict from testifying.

So far as we are advised, these decisions have not been subsequently criticized. Certainly they have not been criticized, modified, or overruled with reference to any of the matters to which we have referred. If they be sound, then we submit that by a much stronger reason, when Congress, by legislation, provided that a defendant might testify in his own behalf at his request, there remained no reason whatsoever for the exclusion of the defendant's wife in his behalf.

Remember that in the *Jin Fuey Moy* case this court said:

> "The rule that excludes a wife from testifying for her husband is based *upon her interest in the event*, and applies irrespective of the kind of testimony which she might give" (Page 195).

Now comes the legislative branch of the government and says that the most interested party in the outcome of a trial, to wit, the defendant, may testify if he so desires. The

only reason for excluding him was his interest in the event. Under the same reasoning that was controlling in the *Reid* case, the *Benson* case, and the *Rosen* case, just referred to and quoted from, Congress must have intended, by such action, to make the wife of the defendant competent, at the same time that it made the defendant competent.

It seems to us that to hold otherwise, must, of necessity, weaken the strength and effectiveness of the *Reid* case, the *Benson* case, and the *Rosen* case, as authority; and it must be remembered that if the authority of the Reid case, particularly, is destroyed, then one has swept away the entire foundation for the rule for which the government must contend in order to sustain the decision of the lower courts.

Therefore, we very earnestly and seriously contend that in any event, whether this case be decided upon the principles of logic and reason, or whether the Court determines to adhere rigidly and steadfastly to the doctrine of *stare decisis;* upon any construction of the Act of 1789, and upon any theory of the origin and evolution of the rules of evidence in the federal courts, it must be held that the wife of the appellant in this case was a competent witness in his behalf, and that reversible error was committed when she was not permitted to testify at his instance.

Conclusion.

It is therefore respectfully submitted that this Court should reverse the decision of the District Court for the Middle District of North Carolina and the Circuit Court of Appeals for the Fourth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 394

JOHN S. FUNK, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals, appearing at pages 68–70 of the record, is reported in 66 F. (2d) 70. This opinion refers to the opinion of the Circuit Court of Appeals on a previous appeal (46 F. (2d) 417) for a discussion of the question of the competency of petitioner's wife to testify on his behalf. (See 46 F. (2d) 420–421.)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 3, 1933 (R. 70). The petition for writ of certiorari was filed August 28, 1933, and was granted October 16, 1933 (R. 71), limited as hereinafter set forth. The jurisdiction of this Court

is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

At the time this Court granted the petition for certiorari it also granted a motion by the petitioner for leave to proceed *in forma pauperis*.

QUESTION PRESENTED

In granting certiorari this Court limited its review "to the question as to what law is applicable to the determination of the competency of the wife of the petitioner as a witness" (R. 71).

The record discloses that the trial court refused to allow the wife to testify on behalf of her husband, who was on trial for conspiracy to violate the National Prohibition Act, or to state, for the purposes of the record, what the substance of her testimony would be if she had been permitted to testify.[1]

STATEMENT

Petitioner, a prohibition agent, together with one Dowdy was indicted in the District Court of the United States for the Middle District of North Car-

[1] The inference from petitioner's brief is that the wife was called to refute or explain the testimony which had been given by a witness for the Government named Martin. Martin was named in the indictment as a coconspirator but was not indicted because, according to the indictment, he was to be used as a witness for the Government (R. 2). Petitioner's brief states that during the course of the trial Martin testified to acts and conversations in the presence of Mrs. Funk, wife of the defendant, and to certain telephone conversations with her. See also the seventh assignment of error below (R. 55).

olina for conspiring to violate the National Prohibition Act (R. 1–7). One Martin was named as a conspirator in the indictment but was not indicted for the reason that, according to the indictment, he was to be used as a witness for the Government (R. 2). Dowdy and the petitioner were both convicted and appealed to the Circuit Court of Appeals for the Fourth Circuit. That court, one judge dissenting without opinion, reversed the convictions of both defendants and ordered the District Court to grant a new trial (46 F. (2d) 417–427). At this second trial the District Court directed the jury to return a verdict of not guilty as to Dowdy (R. 64, 69), but petitioner was again found guilty (R. 64) and was sentenced to imprisonment for a year and a day (R. 64.)

With reference to the question presented for review in this Court the record discloses that after the Government had rested its case at the second trial and a motion for a directed verdict by the petitioner had been denied, the petitioner offered his wife as a witness on his behalf. The Government objected; the objection was sustained, and the petitioner excepted (R. 29). Following this ruling the petitioner insisted that his wife be permitted to state under oath the substance of her testimony for the benefit of the record. This was objected to by the Government; the objection was sustained and an exception noted.[2]

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[2] See footnote 1 as to the purpose for which, according to petitioner's brief, petitioner desired his wife's testimony.

At the first trial the testimony of petitioner's wife was sought both by petitioner and by his co-defendant, Dowdy. The trial court refused to allow the wife to testify at the instance of either defendant, and on appeal this refusal was assigned as error. The Circuit Court of Appeals held, however, that petitioner's wife was not a competent witness for either defendant (46 F. (2d) 420–421).

On the second appeal, the appeal in the instant proceeding, the petitioner again presented to the Circuit Court of Appeals the question whether his wife was competent to testify on his behalf (R. 55). After passing upon another question raised by the petitioner, the court said (R. 69):

> All other assignments of error that are of sufficient merit to warrant discussion were fully considered and, we think, properly passed on in the former decision.

The court consequently rejected petitioner's contention on the basis of its prior opinion.

As the prior opinion was not incorporated in the instant record, we quote the pertinent portion thereof for the convenience of the Court (46 F. (2d) 420–421):

> Both defendants have assigned error to the ruling of the District Court in refusing to permit Mrs. Funk, the wife of the defendant Funk, to testify. Before the defendant Funk rested his case, he called her as a witness on his own behalf, and the court ruled

that she was not competent, and he thereupon excepted to the ruling and rested his case. The defendant Dowdy then called Mrs. Funk as a witness, and the court inquired whether she could testify to anything that was not in behalf of her husband; and Dowdy's attorney thereupon said that it was in defense of her husband as well as of Dowdy. The court thereupon ruled that she was not a competent witness for Dowdy, to which Dowdy excepted.

In the federal courts, the rule has prevailed for many years that in a criminal trial, the wife of a defendant is not a competent witness in his behalf *Jin Fuey Moy* v. *U.S.*, 254 U.S. 189, 41 S.Ct. 98, 65 L.Ed. 214; *Hendrix* v. *U.S.*, 219 U.S. 79, 31 S.Ct. 193, 55 L.Ed. 102; *Barton* v. *U.S.* (C.C.A. 4th), 25 F. (2d) 967; *Fisher* v. *U.S.* (C.C.A. 4th), 32 F. (2d) 602, 604; *Krashowitz* v. *U.S.* (C.C.A. 4th), 282 F. 599.

The federal courts have also held that where two or more defendants are jointly indicted and jointly tried, the wife of one of them is not a competent witness for a codefendant of her husband. *Israel* v. *U.S.* (C.C.A. 6th), 3 F. (2d) 743, 745; *Haddad* v. *U.S.* (C.C.A. 6th), 294 F. 536; *Talbot* v. *U.S.* (C.C.A. 5th), 208 F. 144; *U.S.* v. *Davidson* (D.C.), 285 F. 661.

Certainly, where the testimony of a wife for a codefendant will inure to the benefit of her husband, as was conceded to be the case here, she is not a competent witness. *Israel* v. *U.S., supra.*

It has been very earnestly argued, however, that the decisions of the Supreme Court in the *Jin Fuey Moy* and *Hendrix cases, supra,* are not to be taken as ruling positively that the wife is not a competent witness, in view of the decision of that court in the case of *Rosen* v. *U.S.*, 245 U.S. 467, 38 S.Ct. 148, 62 L.Ed. 406. Our attention is also called to the case of *Rendleman* v. *U.S.* (C.C.A 9th) 18 F. (2d) 27, which holds that a wife is not incompetent to testify in behalf of her husband in a criminal case. It is to be observed that the Supreme Court decision in the *Rosen case* was rendered before the decision in the *Jin Fuey Moy case.* After due consideration, we are of opinion that the Supreme Court has definitely held that a wife is not a competent witness in such cases. This court has consistently followed these decisions and feels bound to observe the rule so long deemed settled, until there is a decision of the Supreme Court to the contrary.

Compare *Tinsley et al.* v. *U.S.* (C.C.A. 8th) 43 F. (2d) 890.

SUMMARY OF ARGUMENT

We contend that the law which is applicable in determining the competency of petitioner's wife to testify as a witness in his behalf is the law of North Carolina as it existed in 1789. *United States* v. *Reid,* 12 How. 361; *Logan* v. *United States,* 144 U.S. 263; *Jin Fuey Moy* v. *United States,* 254 U.S. 189. There is nothing in *Benson* v. *United States,*

146 U.S. 325, or *Rosen* v. *United States,* 245 U.S. 467, which requires a different conclusion.

In 1789 the common law was in force in North Carolina. Under that law petitioner's wife was not a competent witness. Therefore, the trial court did not err in refusing to allow her to testify.

ARGUMENT

We think that "the question as to what law is applicable to the determination of the competency of the wife of the petitioner as a witness" has been conclusively answered by the decisions of this Court in *United States* v. *Reid,* 12 How. 361; *Logan* v. *United States,* 144 U.S. 263, and *Jin Fuey Moy* v. *United States,* 254 U.S. 189.

In the *Reid case* (decided in 1851), Reid and one Clements were jointly indicted in the Circuit Court of the United States for the Eastern District of Virginia for murder committed by them on the high seas on an American ship. By permission of the court the defendants were tried separately, and upon the trial of Reid he proposed to call Clements as a witness on his behalf. The court rejected the testimony, being of the opinion that as Clements was jointly indicted with Reid he was not a competent witness. Reid was found guilty, and the question of the competency of Clements as a witness on Reid's behalf was presented to this Court on a certificate of division of opinion by the judges of the Circuit Court. By a statute of Virginia adopted in 1849 it was

provided "that no person who is not jointly tried with the defendant shall be incompetent to testify in any prosecution by reason of interest in the subject-matter thereof," and the first question considered by this Court was whether this statute was applicable in the case at bar by reason of Section 34 of the Judiciary Act of 1789 (subsequently Section 721 R.S.; U.S.C., Title 28, Sec. 725), which provided "That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." This Court held (p. 363):

> The language of this section cannot, upon any fair construction, be extended beyond civil cases at common law, as contradistinguished from suits in equity. So far as concerns rights of property, it is the only rule that could be adopted by the courts of the United States, and the only one that Congress had the power to establish. And the section above quoted was merely intended to confer on the courts of the United States the jurisdiction necessary to enable them to administer the laws of the states. But it could not be supposed, without very plain words to show it, that Congress intended to give to the states the power of prescribing the rules of evidence in trials for offences against the United States. For this construction would in effect place the criminal jurisprudence of

one sovereignty under the control of another. It is evident that such could not be the design of this act of Congress, and that the statute of Virginia was not the law by which the admissibility of Clements as a witness ought to have been decided.

With reference to certain other provisions of the Judiciary Act the Court said (p. 365):

> The Judiciary Act of 1789, § 20, provides for the manner of summoning jurors, and directs that in all cases (of course including criminal as well as civil cases) they shall be designated by lot or otherwise in each state, according to the mode of forming juries therein as then practiced, so far as the law of the state shall render such designation practicable by the courts or marshals of the United States; and that the jurors shall have the same qualifications as were requisite for jurors by the law of the state of which they are citizens, in the highest court of law in the state. Both of these provisions are confined by plain language to the state laws as they then were.
>
> The Crimes Act, as it is usually called, of 1790, § 29, makes some further regulations, which it is not necessary here to specify, in relation to the proceedings and right of peremptory challenge in criminal cases before the jury are impanelled.
>
> But neither of these acts make any express provision concerning the mode of conducting the trial after the jury are sworn. They

> do not prescribe any rule by which it is to be conducted, nor the testimony by which the guilt or innocence of the party is to be determined.

The Court then laid down the rule which we submit is applicable in the instant case. It said (pp. 363, 365) that in the absence of "any act of Congress prescribing in express words the rule by which the courts of the United States are to be governed, in the admission of testimony in criminal cases,"* the law which applies "is the law of the state, as it was when the courts of the United States were established by the Judiciary Act of 1789"; that it must have been the intention of Congress to refer the courts of the United States "to some known and established rule, which was supposed to be so familiar and well understood in the trial by jury that legislation upon the subject would be

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* So far as we can find, the only Federal statutes making the wife of a defendant competent to testify in a criminal proceeding of any kind are Section 1 of the Act of March 3, 1887, c. 397, 24 Stat. 635 (U.S.C., Title 28, Sec. 633), relating to prosecutions for bigamy, polygamy, or unlawful cohabitation, and Section 4 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, 878–879 (U.S.C., Title 8, Sec. 138), relating to prosecutions based upon the importation of aliens for immoral purposes. These statutes obviously have no bearing on the instant case. The crime here involved is a conspiracy to violate the National Prohibition Act.

deemed superfluous" and that "the only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress [the Judiciary Act of 1789 and the Crimes Act of 1790], was that which was then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts." The Court then said (pp. 365–366):

> this view of the subject is confirmed by the provisions in the act of 1789, which refers its courts and officers to the laws of the respective states for the qualifications of jurors and the mode of selecting them. And as the courts of the United States were in these respects to be governed by the laws of the several states, it would seem necessarily to follow that the same principles were to prevail throughout the trial: and that they were to be governed in like manner, in the ulterior proceedings after the jury was sworn, where there was no law of Congress to the contrary.
>
> The courts of the United States have uniformly acted upon this construction of these acts of Congress, and it has thus been sanctioned by a practice of sixty years. They refer undoubtedly to English works and English decisions. For the law of evidence in this country, like our other laws, being founded upon the ancient common law of England, the decisions of its courts show

> what is our own law upon the subject where it has not been changed by statute or usage. But the rules of evidence in criminal cases, are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed. Congress may certainly change it whenever they think proper, within the limits prescribed by the Constitution. But no law of a state made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases: and the testimony of Clements was therefore properly rejected, and furnishes no ground for a new trial.

It is true that in *Rosen* v. *United States*, 245 U.S. 467, 470, a decision which will be discussed later, this Court said that:

> While the decision in *United States* v. *Reid*, *supra*, has not been specifically overruled, its authority must be regarded as seriously shaken by the decisions in *Logan* v. *United States*, 144 U.S. 263–301, and in *Benson* v. *United States*, 146 U.S. 325.

But we think that so far as the question involved in the instant case is concerned, there is nothing in either the *Logan* or the *Benson case* which destroys the applicability of the doctrine announced in the *Reid case*, and that this was definitely recognized by this Court in its decision in *Jin Fuey Moy* v. *United States*, 254 U.S. 189, which was decided after the *Rosen case*.

The *Logan* decision constitutes, we believe, merely a logical extension of the rule announced 40 years before in the *Reid case*. In the *Logan case*, which was decided in 1892, Logan and others were indicted in the District Court of the United States for the Northern District of Texas for conspiracy to injure citizens of the United States in the exercise of a right secured to them by the Constitution and laws of the United States, and for murder committed in the prosecution of the conspiracy. At the trial two witnesses, one who had been convicted of a felony in a State court in North Carolina, and another who had been convicted of a felony in a State court in Texas but who had been pardoned, were permitted to testify for the Government over the objection of the defendants. Following conviction Logan and several codefendants sued out a writ of error from this Court. The plaintiffs in error contended in this Court that the two witnesses who had been previously convicted and sentenced for felony were incompetent under a Texas statute of 1879 (originally enacted in 1858), which they asserted was rendered applicable by virtue of the provision of Section 858 of the Revised Statutes (U.S.C., Title 28, Sec. 631) that, with certain exceptions not material, "the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

A prior statute of the Republic of Texas, which was in force when Texas was admitted into the Union in 1848, contained a provision that "the common law of England, as now practiced and understood, shall, in its application to juries and to evidence, be followed and practised by the courts of this republic, so far as the same may not be inconsistent with this act, or any other law passed by this congress." After referring to its construction in the *Reid case* of the phrase "trials at common law" appearing in Section 34 of the Judiciary Act of 1789 as not including criminal trials, the Court said (p. 301):

> By a familiar rule, the words "trials at common law" in this statute [Sec. 858, R.S.] are to receive the construction which had been judicially given to the same words in the earlier statute relating to the same subject.

The Court then laid down the rule which we think is but a logical extension of the principle which it had announced in the *Reid case* (pp. 302–303):

> For the reasons above stated, the provision of section 858 of the Revised Statutes, that "the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty," has no application

> to criminal trials;[4] and, therefore, the competency of witnesses in criminal trials in the courts of the United States held within the State of Texas is not governed by a statute of the State which was first enacted in 1858, but, except so far as Congress has made specific provisions upon the subject, is governed by the common law, which, as has been seen, was the law of Texas before the passage of that statute and at the time of the admission of Texas into the Union as a State.

Applying the principles of the common law, the Court held that the witness who had been convicted in North Carolina was not incompetent since conviction in another State did not disqualify and that the witness who had been convicted in Texas was likewise competent because his competency had been restored by a pardon.

Considering the *Reid* and the *Logan cases* together, we think they established a rule which was susceptible of easy and certain application, i.e., in a Federal criminal trial held in one of the thirteen original States the law of that State in force in 1789 applies in determining the competency of a witness, while in the newer States the applicable law is that

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[4] By the Act of June 29, 1906, c. 3608, 34 Stat. 618 (U.S.C., Title 28, Sec. 631), Section 858, R.S., was amended so as to read as follows:

"The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held."

which was in effect when the State was admitted into the Union.

We now come to the *Benson case,* 146 U.S. 325, the other decision referred to in the *Rosen case, supra.* This case was decided in 1892, about seven months after the *Logan case* was decided. We fail to see any inconsistency between the *Benson* decision and the *Reid* and *Logan* decisions. The *Benson case* arose in the District Court of the United States for the District of Kansas. Benson was indicted jointly with one Mary Rautzahn for a murder alleged to have been committed on a military reservation. On motion of the Government a severance was had between the case of Mary Rautzahn and that of Benson. She, not having been tried, was called as a witness on behalf of the Government against Benson, and her testimony was admitted. Benson was convicted and sued out a writ of error from this Court.

The only question decided which has any bearing on the question here presented involved the competency of Mary Rautzahn as a witness for the Government. The Court's approach to the problem before it is peculiarly significant. It immediately turned to the common law (pp. 333–334) and as a result found that while there was a conflict of authority on the question whether a codefendant not on trial may be called as a witness for the prosecution, the preponderance of authority seemed to

favor the admission of such testimony. Why did the Court turn to the common law in passing upon the question before it? Although it did not expressly say in its opinion that it did this because of its decision in the *Logan case* only a few months before, it is important to note that the constitution of Kansas, adopted July 29, 1859, provided that all laws in force in the Territory of Kansas at the time of the acceptance of the State constitution by Congress should continue and remain in full force until they expired or were repealed (Compiled Laws of Kansas, 1862, Sec. 4, p. 70), and that by a statute of the Territory of Kansas enacted February 1859, only five months before the adoption of the State constitution, it was provided, in Section 1, that:

> The common law of England and all statutes and acts of Parliament in aid thereof, made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom and not repugnant to or inconsistent with the constitution of the United States and the act entitled "an act to organize the Territory of Nebraska and Kansas," or any statute law which may from time to time be made or passed by this or any subsequent Legislative Assembly of the Territory of Kansas, shall be the rule of action and decision in this Territory, any law, custom or usage to the contrary notwithstanding. (Compiled Laws of Kansas, 1862, p. 678.)

The Court then turned to the *Reid case*, which it held not binding for the following reasons (pp. 334–335):

> The precise question in that case was as to the right of the defendant to call his codefendant, and not that of the government to call the codefendant, and a distinction has been recognized between the two cases. It is true that the reasons given for the exclusion of the witness in one are largely the same as those given for his exclusion in the other, to wit, interest and being party to the record; but public policy is also urged in favor of the exclusion of one defendant as a witness for his codefendant, for each would try to swear the other out of the charge. And as the distinction prevailed, whether founded on satisfactory reasons or not, it is sufficient to justify us in holding that that case is not decisive of this. Further, the stress in that case was not on this question. The defendant was indicted and tried in the Circuit Court of the United States for the District of Virginia. A statute had been passed in that State, in terms permitting a codefendant when not jointly tried to testify in favor of the one on trial, and that statute was invoked as securing the competency of the witness, and the question which was discussed was whether the existing statute law of Virginia controlled, and it was held that it did not, and that the question was to be determined by the common law as it stood in Virginia at the date of the Judiciary Act

> of 1789. It was assumed both in this court and in the Circuit Court, 3 Hughes, 509, 539, 540, that by that law the codefendant was incompetent. It was not affirmed that such was the rule in the mother country or in the other States of the Union.

It was only after it had made this approach to its problem that the Court declared (p. 335) that it did not feel itself precluded from examining the question presented "in the light of general authority and sound reason." The Court then referred to the modern tendency "to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion," a change which, it said, "has been wrought partially by legislation and partially by judicial construction" (p. 336), following which it said (p. 337):

> The spirit of this legislation has controlled the decisions of the courts, and steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed, till now it is generally, though perhaps not universally, true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, *like that of husband and wife,* forbids the breaking of silence. [Italics ours.]

Motivated by the fact that under the legislation to which it referred, "interest and being party

to the record do not exclude a defendant on trial from the witness stand," the Court said in effect that it could see no good reason why a codefendant not on trial should be adjudged incompetent to testify for the Government. It therefore held that the trial court did not err in permitting Mary Rautzahn to testify.

In other words the situation in the *Benson case*, as we view it, was simply that the Court felt at liberty, in view of the conflict of authority as to what the common law was on the subject with which it was concerned to follow that line of decisions which it regarded as more in harmony with the modern rule with reference to testimonial competency. We think it is plainly evident that this Court did not intend in the *Benson case* to overrule what it had held in either the *Reid case* or the *Logan case* as to the proper law governing the determination of the competency of a witness in a Federal criminal case. In fact, although it did not specifically refer in its opinion to the *Logan case*, it certainly followed the technique prescribed in that case in approaching the particular problem of competency before it in the light of the common law, which, it would appear, was the law in force at the time Kansas was admitted into the Union.

The *Benson case* was followed by two decisions of this Court which seem to us to confirm our interpretation of that decision. *Graves* v. *United States*, 150 U.S. 118 (decided in 1893), and *Hendrix* v. *United States*, 219 U.S. 79 (decided in 1911).

In the former case Graves was convicted in the Circuit Court of the United States for the Western District of Arkansas for murder. In his argument to the jury the prosecuting attorney commented on the absence of the defendant's wife from the court room. He said that she should have been sitting by her husband's side during the trial so that witnesses for the Government could see her and identify her as the woman who was said to have been with the defendant when he was seen near the place of the crime. This Court held, however, that as the wife of a person accused of crime was not a competent witness either in his behalf or on behalf of the Government, it was improper for the prosecuting attorney to comment upon the absence of the wife of the defendant.

In the latter case Hendrix was convicted in the District Court of the United States for the Eastern District of Texas of murder. In passing upon the competency of Hendrix's wife to testify in his behalf this Court said (p. 91):

> It is assigned as error that the wife of Hendrix was not allowed to testify in his behalf to certain matters which, it is contended, were "vitally material to his defense." The ruling was not error. *Logan* v. *United States*, 144 U.S. 263.

It is significant that in both cases the basis of the decision was the well-recognized common-law rule that the wife of a defendant in a criminal case may not testify either for or against her husband. There was no attempt in either case to formulate

any new principle more in harmony with the modern trend of removing testimonial disqualifications, and, so far as we can see, the only conceivable reason for citing the *Logan case* in the *Hendrix case* was to call attention to the fact that the rule which settled the question of competency for the Court was the common law as it existed in Texas at the time that State was admitted into the Union. The *Logan case* was not pertinent in the consideration of the question before the Court in any other respect.

We now pass to the *Rosen case,* 245 U.S. 467 (decided in 1918), the case principally relied upon by the petitioner. Briefly, the facts in that case were that Rosen, Wagner, and Broder were indicted in the District Court of the United States for the Eastern District of New York for conspiring to receive stolen mail. Broder pleaded guilty and was called as a witness by the Government. He had previously been convicted and sentenced in a New York State court for forgery. The defendants objected to Broder's competency as a witness, but the objection was overruled and Broder was permitted to testify. The defendants made the contention in this Court that under the *Reid* decision their objection should have been sustained, because by the common law as it was administered in New York in 1789 a person found guilty of forgery and sentenced was thereby rendered incompetent as a witness until pardoned. This Court held, however, two Justices dissenting, that it would not be

bound by the common-law rule of 1789 disqualifying witnesses convicted of crime, but would follow the modern rule, supported both by legislation and the great weight of judicial authority, under which all persons of competent understanding are permitted to testify to relevant facts within their knowledge, leaving to the jury the question of the weight and credibility of such testimony.[5]

However sympathetic one may be with the result reached by this ruling, there are, it seems to us, two things which should be borne in mind in considering this case in connection with the question here presented. The first is the basis of the majority's conclusion that the Court was not bound by the common-law rule of 1789. While the opinion states that although the decision in the *Reid case* "has not been specifically overruled, its authority must be regarded as seriously shaken by the decisions" in the *Logan* and *Benson cases,* there is no specific discussion of the *Logan case.* With reference to the *Benson case,* the opinion states (p. 470):

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[5] *Greer* v. *United States*, 245 U.S. 559, cited by the petitioner, contributes nothing of value in the discussion of the question here involved. While the *Rosen* decision was cited in that case, which was decided twenty-one days after the *Rosen case*, the case did not involve any question of testimonial competency. Furthermore, the statement in the opinion in that case as to the effect of the *Rosen* decision was obviously not only dictum but, we respectfully submit, was manifestly too broad. The *Rosen case* did not deal with the rules of evidence generally, as indicated in the opinion, but merely with the question of the competency of a particular class of witnesses. Cf. *Olmstead* v. *United States*, 277 U.S. 438, 466–469, hereinafter discussed (*infra*, pp. 27–30).

> The *Benson case* differed from the *Reid case* only in that in the former the witness whose competency was objected to was called by the Government while in the latter he was called by the defendant. The testimony of the witness was admitted in the one case but it was rejected in the other, and both judgments were affirmed by this court—however forty years had intervened between the two trials. In the *Benson case*, decided in 1892, this court, after determining that the *Reid case* was not decisive of it, proceeded to examine the question then before it "in the light of general authority and sound reason," and after pointing out the great change in the preceding fifty years in the disposition of courts to hear witnesses rather than to exclude them, a change which was "wrought partially by legislation and partially by judicial construction," and how "the merely technical barriers which excluded witnesses from the stand had been removed," proceeded to dispose of the case quite without reference to the common-law practice, which it was claimed should rule it.

Upon the basis of this analysis of the *Benson case* the majority said that they would accept the authority of that case rather than the *Reid case* and would dispose of the question before them "in the light of general authority and sound reason."

We have heretofore attempted to analyze both the *Logan* and *Benson cases* (*supra*, pp. 13–20), and we respectfully submit that there is at least room for serious doubt that this Court intended in either

case to overturn the doctrine laid down in the *Reid case* that the applicable law for determining the competency of a witness in a criminal case tried in a Federal court situated in one of the thirteen original States was the law of that State as it existed in 1789. Mr. Justice Van Devanter and Mr. Justice McReynolds dissented from so much of the opinion in the *Rosen case* "as departs from the rule settled in *United States* v. *Reid* and *Logan* v. *United States,* which they think is in no way modified by what actually was decided in *Benson* v. *United States.*" 245 U.S. 473.

But perhaps the most important factor to be considered in connection with the *Rosen case* is that the conclusion of the majority that it was not bound by the common-law rule of 1789 was implicitly, if not expressly, limited to the particular disqualification with which the Court was concerned. The opinion states (p. 471):

> Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, *especially as applied to the competency of witnesses convicted of crime,* proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to *such cases as we have here* * * *. [Italics ours.][6]

[6] In the *Rosen case* the Government suggested in its brief certain difficulties in the practical application of the *Reid-Logan* rule in connection with the particular question of

This limitation is particularly important because in the case of *Jin Fuey Moy* v. *United States,* 254 U.S. 189, decided in 1920, only a little over two years after the *Rosen case,* this Court did apply the common-law rule of 1789 when confronted with the question whether a wife of a defendant in a Federal criminal trial in Pennsylvania was competent to testify on his behalf.

In that case, which is clearly decisive of the question presented here, this Court said (p. 195):

> But a single point remains—hardly requiring mention—the refusal to permit defendant's wife to testify in his behalf. It is conceded that she was not a competent witness for all purposes, *a wife's evidence not having been admissible at the time of the first Judiciary Act,* and the relaxation of the rule in this regard by § 858, Rev. Stats., being confined to civil actions. *Logan* v. *United States,* 144 U.S. 263, 299–302; *Hendrix* v. *United States,* 219 U.S. 79, 91. But, it is said, the general rule does not apply to exclude the wife's evidence in the present case because she was offered not "in behalf of her husband," that is, not to prove his innocence, but simply to contradict the testimony of particular witnesses for the Government who had testified to certain matters as having transpired in her presence. The distinction is without substance. The rule that

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competency with which the Court was concerned which do not operate against the use of the rule when applied to the question of competency involved in the instant case.

> excludes a wife from testifying for her husband is based upon her interest in the event, and applies irrespective of the kind of testimony she might give. [Italics ours.]

Subsequent to the decision in the *Jin Fuey Moy* case this Court, in 1928, in *Barton* v. *United States,* 278 U.S. 621, denied an application for certiorari to review a decision of the Circuit Court of Appeals for the Fourth Circuit (25 F. (2d) 967), which held that the wife of a defendant in a Federal criminal trial in South Carolina was not a competent witness on his behalf.

As a further indication that this Court did not intend its decision in the *Rosen case* to abrogate the rule laid down in the *Reid* and *Logan cases,* except in so far as that rule operated to prevent the testimony of the particular class of witnesses there involved, we refer to the recent decision of this Court in *Olmstead* v. *United States,* 277 U.S. 438, decided in 1928. In that case the principal question decided was that "wire tapping" by Government agents did not, under certain circumstances, constitute a search or seizure within the meaning of the Fourth Amendment. This disposed of the only question involved under the terms of the order granting certiorari, but some of the members of the Court, according to the opinion (p. 466), "departing from that order, have concluded that there is merit in the two-fold objection overruled in both courts below that evidence obtained through intercepting of telephone messages by government

agents was inadmissible because the mode of obtaining it was unethical and a misdemeanor under the law of Washington." The Washington statute to which reference was made was enacted in 1909. In passing upon these additional questions this Court said (p. 466–469):

> While a Territory, the English common law prevailed in Washington and thus continued after her admission in 1889. The rules of evidence in criminal cases in courts of the United States sitting there, consequently are those of the common law. *United States* v. *Reid*, 12 How. 361, 363, 366; *Logan* v. *United States*, 144 U.S. 263, 301; *Rosen* v. *United States*, 245 U.S. 467; *Withaup* v. *United States*, 127 Fed. 530, 534; *Robinson* v. *United States*, 292 Fed. 683, 685.
>
> The common law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained. * * *
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> * * * * *
>
> The rule is supported by many English and American cases cited by Jones in vol. 5, § 2075, note 3, and § 2076, note 6; and by Wigmore, vol. 4, § 2183. It is recognized by this Court in *Adams* v. *New York*, 192 U.S. 585. The *Weeks* case announced an exception to the common law rule by excluding all evidence in the procuring of which government officials took part by methods forbidden by the Fourth and Fifth Amend-

ments. Many state courts do not follow the *Weeks* case. *People* v. *Defore*, 242 N.Y. 13. But those who do, treat it as an exception to the general common law rule and required by constitutional limitations. * * * The common law rule must apply in the case at bar.

Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured. This would be at variance with the common law doctrine generally supported by authority. * * *

* * * In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.

* * * * *

This statute does not declare that evidence obtained by such interception shall be inadmissible, and by the common law, already referred to, it would not be. *People* v. *McDonald*, 177 App. Div. (N.Y.) 806. Whether the State of Washington may prosecute and punish federal officers violating this law and those whose messages were intercepted may sue them civilly is not before us. But clearly a statute, passed twenty years after the admission of the State into the Union cannot

affect the rules of evidence applicable in courts of the United States in criminal cases. Chief Justice Taney, in *United States* v. *Reid*, 12 How. 361, 363, construing the 34th section of the Judiciary Act, said:

"But it could not be supposed, without very plain words to show it, that Congress intended to give the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would place the criminal jurisprudence of one sovereignty under the control of another." See also *Withaup* v. *United States*, 127 Fed. 530, 534.

In view of the decisions of this Court in the *Reid*, *Logan* and *Jin Fuey Moy cases* we submit that the law applicable in determining the competency of the wife of the petitioner as a witness on his behalf is the law as it existed in the State of North Carolina in 1789. At that time the common law was in force in North Carolina. *Brown* v. *United States*, 233 Fed. 353, 354 (C.C.A. 6th). According to Blackstone, who wrote in 1765 (1 Bl. Com., Lewis ed., 443), the rule of the common law with reference to the competency of a wife as a witness either for or against her husband was as follows:

In criminal prosecutions, it is true, the wife may be indicted and punished separately; for the union is only a civil union. But in trials of any sort they are not allowed to be witnesses *for*, or against, each other; partly because it is impossible their testi-

> mony should be indifferent, but principally because of the union of person; and therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of law, *"nemo in propria causa testis esse debet"*; and if *against* each other, they would contradict another maxim, *"nemo tenetur seipsum accusare."* But, where the offence is directly against the person of the wife, this rule has been usually dispensed with * * * .

See also *Stein* v. *Bowman,* 13 Pet. 209, 221; *Lucas* v. *Brooks,* 18 Wall. 436, 452–453; *Bassett* v. *United States,* 137 U.S. 496, 505; *Hopkins* v. *Grimshaw,* 165 U.S. 342, 349; *Powell* v. *Strickland,* 163 N.C. 393, 395.

The trial court properly ruled, therefore, that the petitioner's wife was not a competent witness. Under the *Reid* and *Logan cases,* it was not required to apply the provision of the existing State statute under which the wife would have been competent to testify. (Sec. 1802, North Carolina Code of 1931.) This provision did not originate until 1881. (Laws of North Carolina, 1881, c. 110.)

Finally, we wish to point out that except for the *Rosen case* we have found no instance in which a testimonial disqualification of the common law has been removed other than by Act of Congress. Examples of the practice in this respect are given in the *Benson* and *Rosen* decisions. (See also Wigmore on Evidence, 2d ed., Vol. I, § 488, note, p. 869, listing the Federal statutes.)

We have not discussed the cases in the lower Federal courts bearing upon the question presented, as we think they tend to confuse rather than to aid in the solution of the question here involved. We have, however, given a summary of those cases in the appendix hereto, pages 33–36, *infra*.

CONCLUSION

We respectfully submit that the judgment below should be affirmed.

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NOVEMBER 1933.

APPENDIX

CASES IN LOWER FEDERAL COURTS

The following Federal criminal cases hold that a wife is incompetent as a witness for her husband:

United States v. *Jones*, 32 Fed. 569 (1887), D.C.S.C.

Wesoky v. *United States*, 175 Fed. 333 (1910), C.C.A. 3d.

Fitter v. *United States*, 258 Fed. 567 (1919), C.C.A. 2d.

Lowe v. *United States*, 282 Fed. 597 (1922), C.C.A. 9th.

Krashowitz v. *United States*, 282 Fed. 599 (1922), C.C.A. 4th.

Slick v. *United States*, 1 F. (2d) 897 (1924), C.C.A. 7th.

Allen v. *United States*, 4 F. (2d) 688 (1925), C.C.A. 7th.

Fasulo v. *United States*, 7 F. (2d) 961 (1925), C.C.A. 9th, reversed on other grounds, 272 U.S. 620.

Liberato v. *United States*, 13 F. (2d) 564 (1926), C.C.A. 9th.

Barton v. *United States*, 25 F. (2d) 967 (1928), C.C.A. 4th, certiorari denied, 278 U.S. 621.

Fisher v. *United States*, 32 F. (2d) 602 (1929), C.C.A. 4th.

The following Federal criminal case holds that a wife is an incompetent witness for the Government against her husband even where the offense was against her:

Johnson v. *United States*, 221 Fed. 250 (1915) C.C.A. 8th.

The following Federal criminal cases hold that a wife is a competent witness for the Government against her husband on the theory that the offense was against her person:

United States v. *Rispoli*, 189 Fed. 271 (1911), D.C.E.D.Pa.

Cohen v. *United States*, 214 Fed. 23 (1914), C.C.A. 9th, certiorari denied, 235 U.S. 696.

Pappas v. *United States*, 241 Fed. 665 (1917), C.C.A. 9th.

Denning v. *United States*, 247 Fed. 463 (1918), C.C.A. 5th.

Kerr v. *United States*, 11 F. (2d) 227 (1926), C.C.A. 9th, certiorari denied, 271 U.S. 689.

The following case holds that the wife is competent to testify for her husband, applying the rule in the *Logan case*, in that she was not incompetent by the law of Washington when it was admitted as a State:

Rendleman v. *United States*, 18 F. (2d) 27 (1927), C.C.A. 9th.

In the following cases the wife of a codefendant was under the circumstances deemed competent:

O'Brien v. *United States*, 299 Fed. 568 (1924), C.C.A. 8th.

Tinsley v. *United States*, 43 F. (2d) 890 (1930), C.C.A. 8th.

Parnell v. *United States*, 64 F. (2d) 324 (1932), C.C.A. 10th.

In the following cases the wife of the codefendant was held not competent:

Talbott v. *United States*, 208 Fed. 144 (1913), C.C.A. 5th, certiorari denied, 232 U.S. 722.

United States v. *Davidson,* 285 Fed. 661 (1922), D.C.E.D.Pa.
Haddad v. *United States,* 294 Fed. 536 (1923), C.C.A. 6th.
United States v. *Liddy,* 2 F. (2d) 60 (1924), D.C.E.D.Pa.
Israel v. *United States,* 3 F. (2d) 743 (1925), C.C.A. 6th.

The following cases, arising in States other than the thirteen original States, applied the rule of the *Logan case* as to the competency of witnesses in Federal criminal cases, i.e., the law as of the time of the State's admission to the Union:

Withaup v. *United States,* 127 Fed. 530 (1903), C.C.A. 8th.
Maxey v. *United States,* 207 Fed. 327 (1913), C.C.A. 8th.
Ding v. *United States,* 247 Fed. 12 (1918), C.C.A. 9th.
McCoy v. *United States,* 247 Fed. 861 (1918), C.C.A. 5th.
Neal v. *United States,* 1 F. (2d) 637 (1924), C.C.A. 8th.

Each of the following Federal criminal cases, arising in one of the thirteen original States, applied the rule of the *Reid case* upon the general question of competency:

United States v. *Hughes,* 175 Fed. 238 (1892), D.C.W.D.Pa.
United States v. *Hall,* 53 Fed. 352 (1892), D.C.W.D.Pa.
Scaffidi v. *United States,* 37 Fed. (2d) 203 (1930), C.C.A. 1st.

The following Federal criminal cases follow the rule of the *Rosen case* as to competency of those previously convicted:

Safford v. *United States,* 252 Fed. 471 (1918), C.C.A. 2d.

Manuel v. *United States,* 254 Fed. 272 (1918), C.C.A. 8th.

Ammerman v. *United States,* 267 Fed. 136 (1920), C.C.A. 8th, certiorari denied, 254 U.S. 650.

Peace v. *United States,* 278 Fed. 180 (1921), C.C.A. 7th.

Solomon v. *United States,* 297 Fed. 82 (1924), C.C.A. 1st.

Hurwitz v. *United States,* 299 Fed. 449 (1924), C.C.A. 8th, certiorari denied, 266 U.S. 613.

McCormick v. *United States,* 9 F. (2d) 237 (1925), C.C.A. 8th.

Hagan v. *United States,* 9 F. (2d) 562 (1925), C.C.A. 8th.

Chapman v. *United States,* 10 F. (2d) 124 (1926), C.C.A. 5th, certiorari denied, 271 U.S. 667.

U. S. GOVERNMENT PRINTING OFFICE, 1933

SUPREME COURT OF THE UNITED STATES.

No. 394.—October Term, 1933.

John S. Funk, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 11, 1933.]

Mr. Justice Sutherland delivered the opinion of the Court.

The sole inquiry to be made in this case is whether in a federal court the wife of the defendant on trial for a criminal offense is a competent witness in his behalf. Her competency to testify against him is not involved.

The petitioner was twice tried and convicted in a federal district court upon an indictment for conspiracy to violate the prohibition law. His conviction on the first trial was reversed by the circuit court of appeals upon a ground not material here. 46 F. (2) 417. Upon the second trial, as upon the first, defendant called his wife to testify in his behalf. At both trials she was excluded upon the ground of incompetency. The circuit court of appeals sustained this ruling upon the first appeal, and also upon the appeal which followed the second trial. 66 F. (2d). 70. We granted certiorari, limited to the question as to what law is applicable to the determination of the competency of the wife of the petitioner as a witness.

Both the petitioner and the government, in presenting the case here, put their chief reliance on prior decisions of this court. The government relies on *United States* v. *Reid*, 12 How. 361; *Logan* v. *United States*, 144 U. S. 263; *Hendrix* v. *United States*, 219 U. S. 79; and *Jin Fuey Moy* v. *United States*, 254 U. S. 189. Petitioner contends that these cases, if not directly contrary to the decisions in *Benson* v. *United States*, 146 U. S. 325, and *Rosen* v. *United States*, 245 U. S. 467, are so in principle. We shall first briefly review these cases, with the exception of the *Hendrix* case and the *Jin Fuey Moy* case, which we leave for consideration until a later point in this opinion.

In the *Reid* case, two persons had been jointly indicted for a murder committed upon the high seas. They were tried separately, and it was held that one of them was not a competent witness in behalf of the other who was first tried. The trial was had in Virginia; and by a statute of that state passed in 1849, if applicable in a federal court, the evidence would have been competent. Section 34 of the Judiciary Act of 1789 declares that the laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply; but the court said that this referred only to civil cases and did not apply in the trial of criminal offenses against the United States. It was conceded that there was no act of Congress prescribing in express words the rule by which the federal courts would be governed in the admission of testimony in criminal cases. "But," the court said (p. 363), "we think it may be found with sufficient certainty, not indeed in direct terms, but by necessary implication, in the acts of 1789 and 1790, establishing the courts of the United States, and providing for the punishment of certain offences."

The court pointed out that the Judiciary Act regulated certain proceedings to be had prior to impaneling the jury, but contained no express provision concerning the mode of conducting the trial after the jury was sworn, and prescribed no rule in respect of the testimony to be taken. Obviously however, it was said, some certain and established rule upon the subject was necessary to enable the courts to administer the criminal jurisprudence of the United States, and Congress must have intended to refer them to some known and established rule "which was supposed to be so familiar and well understood in the trial by jury that legislation upon the subject would be deemed superfluous. This is necessarily to be implied from what these acts of Congress omit, as well as from what they contain." (p. 365.) The court concluded that this could not be the common law as it existed at the time of the emigration of the colonists, or the rule which then prevailed in England, and [therefore] the only known rule which could be supposed to have been in the mind of Congress was that which was in force in the respective states when the federal courts were established by the Judiciary Act of 1789. Applying this rule, it was decided that the witness was incompetent.

In the *Logan* case it was held that the competency of a witness to testify in a federal court sitting in one state, was not affected by his conviction and sentence for felony in another state; and that the competency of another witness was not affected by his conviction of felony in a Texas state court, where the witness had since been pardoned. The indictment was for an offense committed in Texas and there tried. The decision was based not upon any statute of the United States, but upon the ground that the subject "is governed by the common law, which, as has been seen, was the law of Texas . . . . at the time of the admission of Texas into the Union as a State." (p. 303.)

We next consider the two cases upon which petitioner relies. In the *Benson* case two persons were jointly indicted for murder. On motion of the government there was a severance, and Benson was first tried. His codefendant was called as a witness on behalf of the government. The *Reid* case had been cited as practically decisive of the question. But the court, after pointing out what it conceived to be distinguishing features in that case, said (p. 335), "We do not feel ourselves, therefore, precluded by that case from examining this question in the light of general authority and sound reason." The alleged incompetency of the codefendant was rested upon two reasons, first, that he was interested, and second, that he was a party to the record, the basis for the exclusion at common law being fear of perjury. "Nor," the court said, "were those named the only grounds of exclusion from the witness stand; conviction of crime, want of religious belief, and other matters were held sufficient. Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors. But the last fifty years have wrought a great change in these respects, and to-day the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction." Attention then is called to the fact that Congress in 1864 had enacted that no witness should be excluded from testi-

fying in any civil action, with certain exceptions, because he was a party to or interested in the issue tried; and that in 1878 (c. 37, 20 Stat. 30) Congress made the defendant in any criminal case a competent witness at his own request. The opinion then continues (p. 337):

"Legislation of similar import prevails in most of the States. The spirit of this legislation has controlled the decisions of the courts, and steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed, till now it is generally, though perhaps not universally, true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence.

" . . . If interest and being party to the record do not exclude a defendant on trial from the witness stand, upon what reasoning can a codefendant, not on trial, be adjudged incompetent?"

That case was decided December 5, 1892. Twenty-five years later this court had before it for consideration the case of *Rosen* v. *United States, supra.* Rosen had been tried and convicted in a federal district court for conspiracy. A person jointly indicted with Rosen, who had been convicted upon his plea of guilty, was called as a witness by the government and allowed to testify over Rosen's objection. This court sustained the competency of the witness. After saying that while the decision in the *Reid* case had not been specifically overruled, its authority was seriously shaken by the decisions in both the *Logan* and *Benson* cases, the court proceeded to dispose of the question, as it had been disposed of in the *Benson* case, "in the light of general authority and sound reason."

"In the almost twenty [twenty-five] years," the court said, "which have elapsed since the decision of the *Benson Case,* the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain.

"Since the decision in the *Benson Case* we have significant

evidence of the trend of congressional opinion upon this subject in the removal of the disability of witnesses convicted of perjury, Rev. Stats., § 5392, by the enactment of the Federal Criminal Code in 1909 with this provision omitted and § 5392 repealed. This is significant, because the disability to testify, of persons convicted of perjury, survived in some jurisdictions much longer than many of the other common-law disabilities, for the reason that the offense concerns directly the giving of testimony in a court of justice, and conviction of it was accepted as showing a greater disregard for the truth than it was thought should be implied from a conviction of other crime.

"Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved."

It is well to pause at this point to state a little more concisely what was held in these cases. It will be noted, in the first place, that the decision in the *Reid* case was not based upon any express statutory provision. The court found from what the congressional legislation omitted to say, as well as from what it actually said, that in establishing the federal courts in 1789 some definite rule in respect of the testimony to be taken in criminal cases must have been in the mind of Congress; and the rule which the court thought was in the mind of that body was that of the common law as it existed in the thirteen original states in 1789. The *Logan* case in part rejected that view and held that the controlling rule was that of the common law in force at the time of the admission of the state in which the particular trial was had. Taking the two cases together, it is plain enough that the ultimate doctrine announced is that in the taking of testimony in criminal cases, the federal courts are bound by the rules of the common law as they existed at a definitely specified time in the respective states, unless Congress has otherwise provided.

With the conclusion that the controlling rule is that of the common law, the *Benson* case and the *Rosen* case do not conflict; but both cases reject the notion, which the two earlier ones seem to accept, that the courts, in the face of greatly changed conditions, are still chained to the ancient formulae and are powerless to declare and enforce modifications deemed to have been wrought in

the common law itself by force of these changed conditions. Thus, as we have seen, the court in the *Benson* case pointed to the tendency during the preceding years to enlarge the domain of competency, significantly saying that the changes had been wrought not only by legislation but also "partially by judicial construction"; and that it was the *spirit* (not the *letter* be it observed) of this legislation which had controlled the decisions of the courts and steadily removed the merely technical barriers in respect of incompetency, until generally no one was excluded from giving testimony, except under certain peculiar conditions which are set forth. It seems difficult to escape the conclusion that the specific ground upon which the court there rested its determination as to the competency of a codefendant was that, since the defendant had been rendered competent, the competency of the codefendant followed as a natural consequence.

This view of the matter is made more positive by the decision in the *Rosen* case. The question of the testimonial competency of a person jointly indicted with the defendant was disposed of, as the question had been in the *Benson* case, "in the light of general authority and sound reason." The conclusion which the court reached was based not upon any definite act of legislation, but upon the trend of congressional opinion and of legislation (that is to say of legislation generally), and upon the great weight of judicial authority which, since the earlier decisions, had developed in support of a more modern rule. In both cases the court necessarily proceeded upon the theory that the resultant modification which these important considerations had wrought in the rules of the old common law was within the power of the courts to declare and make operative.

That the present case falls within the principles of the *Benson* and *Rosen* cases, and especially of the latter, we think does not reasonably admit of doubt.

The rules of the common law which disqualified as witnesses persons having an interest long since in the main have been abolished both in England and in this country; and what was once regarded as a sufficient ground for excluding the testimony of such persons altogether has come to be uniformly and more sensibly regarded as affecting the credit of the witness only. Whatever was the danger that an interested witness would not speak

the truth—and the danger never was as great as claimed—its effect has been minimized almost to the vanishing point by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances. The modern rule which has removed the disqualification from persons accused of crime gradually came into force after the middle of the last century, and is today universally accepted. The exclusion of the husband or wife is said by this court to be based upon his or her interest in the event. *Jin Fuey Moy* v. *United States*, *supra*. And whether by this is meant a practical interest in the result of the prosecution or merely a sentimental interest because of the marital relationship, makes little difference. In either case, a refusal to permit the wife upon the ground of interest to testify in behalf of her husband, while permitting him, who has the greater interest, to testify for himself, presents a manifest incongruity.

Nor can the exclusion of the wife's testimony, in the face of the broad and liberal extension of the rules in respect of the competency of witnesses generally, be any longer justified, if it ever was justified, on any ground of public policy. It has been said that to admit such testimony is against public policy because it would endanger the harmony and confidence of marital relations, and, moreover, would subject the witness to the temptation to commit perjury. Modern legislation, in making either spouse competent to testify in behalf of the other in criminal cases, has definitely rejected these notions, and in the light of such legislation and of modern thought they seem to be altogether fanciful. The public policy of one generation may not, under changed conditions, be the public policy of another. *Patton* v. *United States*, 281 U. S. 276, 306.

The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth. And since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.

It may be said that the court should continue to enforce the old rule, however contrary to modern experience and thought, and

however opposed, in principle, to the general current of legislation and of judicial opinion, it may have become, leaving to Congress the responsibility of changing it. Of course, Congress has that power; but if Congress fail to act, as it has failed in respect of the matter now under review, and the court be called upon to decide the question, is it not the duty of the court, if it possess the power, to decide it in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past? That this court has the power to do so is necessarily implicit in the opinions delivered in deciding the *Benson* and *Rosen* cases. And that implication, we think, rests upon substantial ground. The rule of the common law which denies the competency of one spouse to testify in behalf of the other in a criminal prosecution has not been modified by congressional legislation; nor has Congress directed the federal courts to follow state law upon that subject, as it has in respect of some other subjects. That this court and the other federal courts, in this situation and by right of their own powers, may decline to enforce the ancient rule of the common law under conditions as they now exist we think is not fairly open to doubt.

In *Hurtado* v. *California,* 110 U. S. 516, 530, this court, after suggesting that it was better not to go too far back into antiquity for the best securities of our liberties, said:

"It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.

"This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.

" . . . and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms."

Compare *Holden* v. *Hardy,* 169 U. S. 366, 385-387.

To concede this capacity for growth and change in the common law by drawing "its inspiration from every fountain of justice," and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a "flexibility and capacity for growth and adaptation" which was "the peculiar boast and excellence" of the system in the place of its origin.

The final question to which we are thus brought is not that of the power of the federal courts to amend or repeal any given rule or principle of the common law, for they neither have nor claim that power, but it is the question of the power of these courts, in the complete absence of congressional legislation on the subject, to declare and effectuate, upon common law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has previously been declared and practiced. It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions. In *Ketelsen* v. *Stilz*, 184 Ind. 702, the supreme court of that state, after pointing out that the common law of England was based upon usages, customs and institutions of the English people as declared from time to time by the courts, said (p. 707):

"The rules so deduced from this system, however, were continually changing and expanding with the progress of society in the application of this system to more diversified circumstances and under more advanced periods. The common law by its own principles adapted itself to varying conditions and modified its own rules so as to serve the ends of justice as prompted by a course of reasoning which was guided by these generally accepted truths. One of its oldest maxims was that where the reason of a rule ceased, the rule also ceased, and it logically followed that when it occurred to the courts that a particular rule had never been founded upon reason, and that no reason existed in support thereof, that rule likewise ceased, and perhaps another sprang up in its place which was based upon reason and justice as then conceived. No rule of the common law could survive the reason on which it was founded. It needed no statute to change it but abrogated itself."

That court then refers to the settled doctrine that an adoption of the common law in general terms does not require, without regard to local circumstances, an unqualified application of all its rules; that the rules, as declared by the English courts at one period or another, have been controlling in this country only so far as they were suited to and in harmony with the genius, spirit and objects of American institutions; and that the rules of the common law considered proper in the eighteenth century are not necessarily so considered in the twentieth. "Since courts have had an existence in America," that court said (p. 708), "they have never hesitated to take upon themselves the responsibility of saying what are the proper rules of the common law."

And the Virginia Supreme Court of Appeals, in *Hamriot* v. *Sherwood*, 82 Va. 1, 15, after pointing to the fact that the common law of England is the law of that commonwealth except so far as it has been altered by statute, or so far as its principles are inapplicable to the state of the country, and that the rules of the common law had undergone modification in the courts of England, notes with obvious approval that "the rules of evidence have been in the courts of this country undergoing such modification and changes, according to the circumstances of the country and the manner and genius of the people."

The supreme court of Connecticut, in *Beardsley* v. *City of Hartford*, 50 Conn. 529, 541-542, after quoting the maxim of the common law, *cessante ratione legis, cessat ipsa lex*, said:

"This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain a controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply as a controlling principle to the new circumstances."

The same thought is expressed in *People* v. *Randolph*, 2 Park. Cr. Rep. (N. Y.) 174, 177:

"Its rules [the rules of the common law] are modified upon its own principles and not in violation of them. Those rules being founded in reason, one of its oldest maxims is, that where the reason of the rule ceases the rule also ceases."

It was in virtue of this maxim of the common law that the supreme court of Nevada, in *Reno Smelting Works* v. *Stevenson*, 20

Nev. 269, in a well reasoned opinion, held that the common law doctrine of riparian rights was unsuited to conditions prevailing in the arid land states and territories of the west, and therefore was without force in Nevada; and that, in respect of the use of water, the applicable rule was based upon the doctrine of prior appropriation for a beneficial use.

In Illinois it was held at an early day that the rule of the common law which required an owner of cattle to keep them upon his own land was not in force in that state, notwithstanding its adoption of the common law of England, being unsuited to conditions there in view of the extensive areas of land which had been left open and unfenced and devoted to grazing purposes. *Seeley* v. *Peters*, 5 Gil. (Ill.) 130.

Numerous additional state decisions to the same effect might be cited; but it seems unnecessary to pursue the matter at greater length.

It results from the foregoing that the decision of the court below, in holding the wife incompetent, is erroneous. But that decision was based primarily upon *Hendrix* v. *United States* and *Jin Fuey Moy* v. *United States, supra*, and in fairness to the lower court it should be said that its decision was fully supported by those cases.

In the *Hendrix* case the opinion does not discuss the point; it simply recites the assignment of error to the effect that the wife of Hendrix had not been allowed to testify in his behalf, and dismisses the matter by the laconic statement, "The ruling was not error." In the *Jin Fuey Moy* case it was conceded at the bar that the wife was not a competent witness for all purposes, but it was contended that her testimony was admissible in that instance because she was offered not in behalf of her husband, that is not to prove his innocence, but simply to contradict the testimony of government witnesses who had testified to certain matters as having transpired in her presence. The court held the distinction to be without substance, as clearly it was, and thereupon disposed of the question by saying that the rule which excludes a wife from testifying for her husband is based upon her interest in the event and applies without regard to the kind of testimony she might give. The point does not seem to have been considered by the lower court to which the writ of error was addressed (253

Fed. 213); nor, as plainly appears, was the real point as it is here involved presented in this court. The matter was disposed of as one "hardly requiring mention." Evidently the point most in the mind of the court was the distinction relied upon, and not the basic rule which was not contested. Both the *Hendrix* and *Jin Fuey Moy* cases are out of harmony with the *Rosen* and *Benson* cases and with the views which we have here expressed. In respect of the question here under review, both are now overruled.

Judgment reversed.

Mr. Justice CARDOZO concurs in the result.

Mr. Justice MCREYNOLDS and Mr. Justice BUTLER are of opinion that the judgment of the court below is right and should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.